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No.

In The

# Supreme Court of the United States

October Term, 1995

BLUE DIAMOND COAL COMPANY,

*Petitioner,*

*vs.*

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY and MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND,

*Respondents.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Between 1947 and 1964, Blue Diamond Coal Company signed collective bargaining agreements which sponsored a Taft-Hartley Act employee benefit plan. During that time, the plan offered no vested benefits. After Blue Diamond's participation in the plan ended in 1964, other plan sponsors granted vested benefits to plan beneficiaries. The Coal Industry Health Benefit Act of 1992 requires all past plan sponsors, including Blue Diamond, to fund the plan's current liabilities for vested benefits.

The question presented for review is whether that statutory funding requirement, as applied to Blue Diamond, violates the Takings Clause of the Fifth Amendment to the United States Constitution.

## LIST OF PARTIES

The names of all parties to the proceedings in the United States Sixth Circuit Court of Appeals appear in the caption of the case, except for Donna Shalala, the Secretary of Health and Human Services; who has been substituted, in this petition, by Shirley S. Chater, Commissioner of Social Security, pursuant to Supreme Court Rule 35.3. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Blue Diamond Coal Company, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 79 F.3d 516 (6th Cir. 1996) and is reproduced in the Appendix filed herewith ("App.") at 3a-22a. The opinion of the United States District Court for the Eastern District of Tennessee is reported at 174 West B.R. 722 (E.D. Tenn. 1994) and is reproduced in the Appendix filed herewith at 23a-37a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 21, 1996. The Court denied the petitioner's timely petition for rehearing on June 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the United States Constitution, Amendment 5, reads as follows:

> [N]or shall private property be taken for public use, without just compensation.

The pertinent provisions of the Coal Industry Health Benefits Act, 102-486 Pub. L. § 19142, and the pertinent codified portions thereof at 26 U.S.C. §§ 9701-9708 are set out in the Appendix at 39a-70a.

## STATEMENT OF THE CASE

### A. The Legislation at Issue

The Coal Industry Health Benefits Act ("the Coal Act"), codified in pertinent part at 26 U.S.C. §§ 9701-9708, (*see* Pub. L. 102-486, Sections 19142, *et al.*), levies monetary assessments on past coal operator signatories to collective bargaining agreements with the United Mine Workers of America ("UMWA"). Many of these coal operators had had no dealings with the UMWA for decades before the 1992 enactment of the Coal Act. The petitioner, Blue Diamond Coal Company ("Blue Diamond") was last subject to a labor agreement with the UMWA in 1964, 28 years before the enactment of the Coal Act. Despite this hiatus, Blue Diamond's first annual assessment under the Coal Act amounted to 4.9 million dollars. The Coal Act requires continuing payments from Blue Diamond; the company's total statutory liability over time will approximate 25 million dollars (in present value).

Each coal operator's mandatory payments are used to fund the otherwise unfunded "plan liabilities" of two UMWA Benefit Funds, created by a UMWA collective bargaining agreement in 1974, pursuant to Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5). The 1974 UMWA labor agreement obligated both UMWA Funds to provide lifetime health care benefits to UMWA pension recipients, together with the spouses, surviving widows, and other dependents of all such pensioners. The Coal Act combines these two former UMWA Funds into the UMWA Combined Benefit Fund, and directs each operator's mandatory payments to that "Combined Fund." The Coal Act then mandates the UMWA Combined Fund to provide health care benefits, and certain death benefits, to all UMWA Pension Fund recipients as of July 20, 1992, together with all surviving spouses and other dependents of present and deceased UMWA pensioners as of that date, for the remainder of their lives.

## B. Petitioner's Involvement in the UMWA Funds

Blue Diamond had collective bargaining agreements with the UMWA between 1947 and 1964. At that time, those contracts required signatory operators to contribute tonnage royalties, expressly limited to the duration of the labor contract, to a single Taft-Hartley fund that preceded the two UMWA Benefit Funds established in 1974. This predecessor Fund was called the UMWA Welfare and Retirement Fund ("the W&R Fund"). Unlike the two 1974 UMWA Benefit Funds, however, the UMWA W&R Fund was not obligated to provide lifetime health care benefits, or any other vested benefits, to its beneficiaries. To the contrary, the W&R Fund's Trustees repeatedly and expressly disavowed any such obligation. The W&R Fund operated openly and explicitly, throughout its existence until 1974, as a non-vested, pay-as-you-go benefit fund. Under explicit plan terms, all W&R Fund benefits, including health care benefits for miners and pensioners, were terminable or revocable at any time in the discretion of the Trustees. Each beneficiary of the UMWA W&R Fund was expressly notified of these provisions. The W&R Fund Trustees reduced, curtailed or terminated many benefits, including various pension and health care benefits, throughout Blue Diamond's involvement with that Fund. Specifically, the W&R Fund Trustees terminated health care benefits for all miners, including pensioners, temporarily in 1949-1950; they terminated health care benefits for most widows of pensioners indefinitely in 1954; and they terminated, again indefinitely, health care benefits for most disabled or unemployed miners in 1960. When Blue Diamond ended its relationship with the W&R Fund in 1964, health care benefits for widows and disabled or unemployed miners were still under suspension. Retired miners generally received health care benefits until death, but such benefits remained revocable under the explicit terms of plan Trustee resolutions, and all such beneficiaries were expressly notified of that revocability (as were all participating employers, including Blue Diamond).

In 1974, ten years after Blue Diamond terminated its relationship with the UMWA and the UMWA W&R Fund, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* was enacted and began requiring the vesting of pension benefits. This led, in part, to negotiations for a new UWMA labor agreement. Those negotiations, in which Blue Diamond neither participated, nor had any interest, produced a new 1974 UMWA agreement. Among other things, the 1974 UMWA agreement effectively terminated the W&R Fund, and established four new UMWA employee benefit funds —two for pension benefits, and the two separate UMWA Benefit Funds for welfare benefits involved in this case. The 1974 UMWA contract removed plan Trustee discretion to grant and/or terminate general benefit programs, and directly required the two new UMWA (welfare) Benefit Funds to provide health care benefits to pension fund recipients, their spouses, including surviving widows, and other dependents, for their entire lives (dependents lost their health care entitlement, generally, upon reaching non-dependent status). These new lifetime Fund obligations were extended, by the 1974 labor agreement, to pre-1974 pension recipients of the W&R Fund, who had previously received only discretionary, pay-as-you-go W&R Fund pensions. For many of these pre-1974 pensioners, the work experience that helped qualify them for their W&R Fund pensions (and accordingly helped qualify them for their newly vested post-1974 pension and health care benefits) included work experience for Blue Diamond before 1964, when Blue Diamond operated under a UMWA contract. Some of those pensioners, and many of their spouses, widows, and other dependents are present day, lifetime beneficiaries of the UMWA Combined Benefit Fund as created by the Coal Act.

The Coal Act basically requires Blue Diamond to fund lifetime health care benefits for those Combined Fund beneficiaries who have had a personal or family employment

relationship with Blue Diamond before 1964. In imposing this requirement, Congress expressly intended to require those persons it deemed to be "most responsible for plan liabilities" to fund those liabilities, and thereby stabilize the otherwise threatened funding resources of the UMWA's Benefit Funds (and thereby protect interstate commerce). *See* Pub. L. 102-486, Section 19142(a). App. at 39a.

**C. Court Proceedings Below and Basis for Original Jurisdiction**

Blue Diamond filed this declaratory judgment action to challenge the constitutionality of the Coal Act's retrospective assessments, as applied to it, under the Fifth Amendment. The suit was brought in the United States District Court for the Eastern District of Tennessee. Blue Diamond sued the UMWA Combined Benefit Fund, the designated recipient of its mandatory payments, and the United States Secretary of Health and Human Services, who assigned individual Fund beneficiaries to past contract signatories for purposes of "premium" assessment calculations, and who set the amount of the per-beneficiary "premium" each operator had to pay for its "assignees." Since suit was commenced, the Coal Act has been amended to name the Commissioner of Social Security to perform the functions previously assigned to the Secretary. Jurisdiction in the District Court was based upon the federal constitutional questions presented, under 28 U.S.C. § 1331, and upon the fact that Blue Diamond, at the time of filing, was a debtor in a currently pending bankruptcy case, under 28 U.S.C. § 1334.

In the District Court, the parties filed cross-motions for summary judgment. However, Blue Diamond emphatically *disputed* the defendants' version of the material facts as presented in their motion. Nonetheless, the District Court

granted defendants' Motion for Summary Judgment and dismissed the case, ruling that the Coal Act's application to Blue Diamond did not violate the Fifth Amendment. The court found, in Blue Diamond's favor, that neither Blue Diamond, nor the UMWA W&R Fund ever promised Fund beneficiaries any permanent or perpetual benefits. App. at 24a, 33a. Accordingly the District Court held that Blue Diamond's own contractual expectations of no further liability to any UMWA fund, after its contract with the UMWA ended in 1964, were reasonable. Applying Takings Clause criteria, the District Court found a significant interference with Blue Diamond's distinct, reasonable, investment-backed expectations. App. at 33a. The District Court further found the "economic impact" of the Coal Act's assessments upon Blue Diamond sufficiently severe to warrant a finding that a "taking" had occurred. App. at 33a. However, the court ultimately reasoned that the character of the Coal Act, as a regulation of the coal industry in general, militated against Blue Diamond's Takings Clause case, and therefore the court granted summary judgment to the defendants. App. at 35a.

The Sixth Circuit Court of Appeals affirmed. That Court, however, differed with the District Court's findings of fact. In its Takings Clause analysis, the Sixth Circuit found that Blue Diamond

> participated in the [the UMWA labor contract] system that fostered UMWA members' legitimate expectations of lifetime benefits as discussed above.

App. at 21a. Based on that factual conclusion, the Sixth Circuit ruled that Blue Diamond's own contract-based expectations of no further liability to any UMWA funds after 1964 were "not reasonable." The "as discussed above" reference by the court, cited as supporting that key fact, consisted solely of the court's

earlier finding in the Due Process Clause portion of its opinion, of a "rational basis" for that conclusion. App. at 13a-14a.

The Sixth Circuit further found that the District Court had not considered, in its "economic impact" analysis, the "proportionality" of Blue Diamond's Coal Act liabilities to Blue Diamond's experience with the UMWA W&R Fund. The court therefore found, on its own, that Blue Diamond's statutory liabilities were "roughly proportional" to Blue Diamond's experience with the W&R Fund. The court identified that "experience" only as the contribution of "service credits" to the UMWA Combined Benefit Fund's "eventual liability." App. at 12a, 14a, 19a. (The pre-1974 UMWA W&R Fund itself never incurred any liabilities for prospective benefits). The court further found that the character of the Coal Act was a required "payment to a private benefit fund," which did not "permanently appropriate" Blue Diamond's assets for the government's own use. App. at 22a. Finding none of the three traditionally-recognized Takings Clause inquiries to favor Blue Diamond's claims, the court sustained summary judgment against Blue Diamond, App. at 22a, and denied Blue Diamond's timely Petition for Rehearing. App. at 1a-2a.

## REASONS FOR GRANTING THE WRIT

### I.

### THE CIRCUIT COURT OF APPEALS DETERMINED A MATERIAL OPERATIVE FACT OF THIS REGULATORY TAKINGS CLAUSE CASE USING AN EXTREMELY DEFERENTIAL "RATIONAL BASIS" REVIEW OF THE PARTIES' CONFLICTING FACTUAL ALLEGATIONS, IN CONFLICT WITH THE SUMMARY JUDGMENT AND TAKINGS CLAUSE PRECEDENTS OF THIS COURT.

Three Circuit Courts of Appeal have now ruled that the Coal Act's premium assessments on pre-1974 UMWA contract signatories do not "take" the "private property" of those signatories under the Takings Clause. *Blue Diamond*, App. at 22a; *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3rd Cir. 1996). In reaching that judgment, each Circuit Court relied materially upon the factual conclusion that pre-1974 UMWA contract signatories, *by themselves*, had "fostered" "the legitimate expectations of lifetime benefits" of UMWA members and their families. *Blue Diamond*, App. at 21a; *Davon*, 75 F.3d at 1129-1130; *Lindsey*, 90 F.3d at 695. Specifically, in the view of the Seventh Circuit in *Davon*, the lead-off case in this trilogy, legitimate expectations of lifetime benefits by UMWA members had been generated by contract signatories *before* the 1974 UMWA contract actually promised such benefits, and those pre-1974 "expectations" provided the necessary regulatory nexus between pre-1974 signatories' conduct and their present Coal Act liabilities to avoid a Takings Clause violation. *See Davon*, 75 F.2d 1128-1130. The Sixth Circuit's and Third Circuit's own factual conclusions, and rationales, were drawn largely from those conclusions in *Davon*.

This prevailing factual conclusion that pre-1974 contract signatories, by themselves, helped to create "legitimate expectations of lifetime benefits," *is simply not true*! Blue Diamond submitted positive proof, in this case, of the utter falsity of that conclusion. Specifically, Blue Diamond introduced the W&R Fund Trustees own public pronouncements, repeated annually and publicly in their official Fund reports, stating as follows:

> All Benefits are subject to termination, suspension, revision or amendment by the Trustees in their discretion at any time. Trustee regulations authorizing Benefits all specifically recognize and restate this governing authority. Each beneficiary is officially notified of this governing provision at the time his Benefit is authorized.
>
> No vested interest in the Fund extends to any beneficiary.

W&R Fund 1964 Annual Report, page 8. In addition, Blue Diamond introduced the following sworn testimony of W&R Fund Trustee Chairman and UMWA President, John L. Lewis, before Congress, in 1955:

> I think it is very definitely true that if the coal industry should decline or go out of business, that the pensions would terminate, as would all other benefits of the Fund. The funds for the pensions are not vested and the beneficiaries of the Fund do not have a vested right in any benefit awarded them. It is a pay-as-you-go fund.

Senate Subcommittee on Welfare and Pension Funds Hearing Transcript, November 28, 1955, page 11. Blue Diamond further proved that the Trustees' actually exercised their discretion to terminate health care benefits on three separate occasions during Blue Diamond's involvement. Applying this Court's summary judgment rules to this and voluminous other proof, the Sixth Circuit should have found *no* "legitimate expectations" of lifetime benefits by UMWA members before 1974! *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986):

> the evidence of [respondent to a Fed. R. Civ. Proc. 56 motion] is to be believed and all justifiable inferences are to be drawn in [its] favor.

477 U.S. at 255.

But, the Sixth Circuit in this case, apparently like the Seventh Circuit in *Davon*, and the Third Circuit in *Lindsey*, disregarded this evidence and that summary judgment rule. Instead, all three Circuit Courts limited their inquiries into the facts of these Takings Clause cases to a "rational basis" review, finding only those "plausible" or "arguable" facts which *supported* the validity of the challenged legislation and which were deemed to have a "rational basis." *Cf., Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 (1993); *Vance v. Bradley*, 440 U.S. 93 (1979). Specifically, in the Sixth Circuit's decision, the Court's factual conclusion that Blue Diamond itself contributed to "legitimate expectations of lifetime benefits" referred directly back to the Court's due process analysis which found only that that conclusion "had a rational basis." App. at 13a. *See also Davon*, 75 F.3d at 1128, for the Seventh Circuit's own reference back to its "rational" due process analysis for support of its Takings

Clause facts. Respectfully, this limited "rational basis" review of facts followed by all three Circuit Courts of Appeals, including the Sixth Circuit in this case, for their Takings Clause inquiries directly conflicts with this Court's Takings Clause precedents.

Judicial review of legislation under the Takings Clause requires an "*ad hoc*, factual inquir[y] into the circumstances of each particular case," *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986). Moreover, in Takings Clause cases analogous to this one, that "*ad hoc*, factual inquiry" must extend specifically to the "*facts of the contractual relationship*" between a former employer and the Taft-Hartley benefit plan to which its statutorily-required payments must be made. *Concrete Pipe and Products of Calif., Inc. v. Construction Laborers' Pension Trust*, 508 U.S. 602, 643 (1993) (emphasis added). Those directives require a more intense, less deferential inquiry into the "operative facts" than the extremely deferential "rational basis" standard for finding facts in substantive due process or equal protection cases. *Nollan v. California Coastal Commission*, Footnote 3, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *see also Nollan, supra*, Dissenting Opinion of Justice Brennan, n. 1, 483 U.S. at 843.

Apparently deeming a finding of a "rational basis" to be the end of its factual inquiry, the Sixth Circuit in particular, disregarded the multitude of other facts proffered by Blue Diamond actually disproving, in a summary judgment context, the Court's conclusions about pre-1974 employee expectations. As a result, Blue Diamond, like the plaintiffs in the Third and Seventh Circuits, and no doubt many, many other pre-1974 signatories to UMWA contracts have unfairly been denied appropriate judicial review of their serious Takings Clause concerns with the Coal Act. This Court should grant review of

this case to address that intolerable situation, where the Circuit Courts have resolved important Takings Clause issues "in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

Moreover, with all due respect to those Courts, the limited "rational basis" approach of the Circuit Courts to Takings Clause fact inquiries, if not corrected by this Court, extend ominous implications well beyond the Coal Act. Takings Clause inquiries require the courts to balance the public interest against the private interest of the complainant. *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 492 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). The ultimate goal of such a balancing test is to determine whether "fairness and justice" require the public to compensate the property owner for the public's acquisition *or use* of his property. *Connolly*, 475 U.S. at 227; *see also United States v. Causby*, 328 U.S. 256, 264 (1946) ("appropriation of the use" held to be a "taking"); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 at Footnote 8 (1979); Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993). It may be necessary to allow the public's representative bodies, such as the United States Congress, to declare the public's own legitimate interest in its legislation, and to give considerable deference to that declaration, even to the point of requiring judicial acceptance of a defense lawyer's *post hoc* rationalization. But to allow the public body, or a defense lawyer for the public body, to declare the facts of the *private interests* of property owners, for purposes of applying this Takings Clause balance, and particularly to give wide, and practically unreviewable deference to *those factual* declarations, puts the government's thumb directly, inextricably, and unfairly on *its side* of the balance. Ultimately, a "rational basis" approach to operative facts can consign the Takings Clause to the status of an inchoate "substantive due process" property right, one acknowledged in theory, but, one which for the last 60 years, at least, has never

been enforced. This Court has clearly rejected such a devaluation of the Takings Clause. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994):

> But simply denominating a governmental measure as a "business regulation" does not immunize it from Constitutional challenge on the grounds that it violates a provision of the Bill of Rights. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . .

114 S. Ct. at 2320. *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152 at n. 4 (1938) (calling for narrower presumption of constitutionality where specific right in the Bill of Rights is at stake).

In applying the "regulatory takings" balance, the Sixth Circuit, like the Seventh and Third Circuits disregarded the actual terms of the contractual relationship between pre-1974 UMWA contract signatories and UMWA Fund beneficiaries in favor of what they perceived to be a "rational" or "plausible" conclusion of pre-1974 beneficiaries' "expectations." Nothing in this Court's closely analogous cases of *Connolly* and *Concrete Pipe* requires this disregard of actual contract terms, particularly in ascertaining the "reasonable, investment backed expectations" of the complainant or in measuring the "proportionality" of a "regulatory" imposition to the plaintiff's actual conduct in a Takings Clause case. Both *Connolly* and *Concrete Pipe* dealt with explicit, written contract terms in a situation where one or another set of expectations derived from

those terms had to yield. The contracts in *Concrete Pipe* and *Connolly* were executed under *concurrent* ERISA vested-benefit regulations. They expressly granted vested benefits, or a "promise" of lifetime benefits, to employees meeting certain service requirements. At the same time, those contracts attempted to shield employers from liability for any underfunding of those otherwise "promised" benefits. As this Court explicitly held in *Connolly*, the only thing the legislation at issue in those cases did was to remove the shield, which itself was already undermined by ERISA's *concurrent*, contingent withdrawal liability. The only other choice facing a regulator in both *Connolly* and *Concrete Pipe*, was to deny the employees *their* own contractually-based expectations, predicated upon a preexisting contractual promise *that was essential* to this Court's rulings in those cases. The legislation at issue in *Connolly* and *Concrete Pipe* was indeed classic "regulation," *and*, it was classic regulation of *contracts*.

In complete distinction of the "operative facts" found in *Connolly* and *Concrete Pipe*, Blue Diamond's contractual relationship with the W&R Fund and its beneficiaries clearly, plainly, and expressly precluded any *employee expectations* of interminable benefits. As the District Court found, there was no "promise" of lifetime benefits. The Coal Act is *not* proportional to the effects of Blue Diamond's *actual conduct* the statute supposedly regulates. *Compare Concrete Pipe*, 508 U.S. 602, 643:

> The Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead the Act safeguards the participants in multi-employers pension plans *by requiring a withdrawing employer to fund its share of the*

> *plan obligations incurred during its association with the plan.*

(Emphasis added).

During Blue Diamond's "association with the plan," the W&R Fund incurred no obligations or liabilities, a *fact* proven in this record by the sworn testimony of the UMWA W&R Fund's own Comptroller, in 1971. Sixth Circuit Joint Appendix, page 499. Only by ignoring the actual contractual terms between Blue Diamond and the W&R Fund, in direct conflict with *Concrete Pipe's* express mandate to consider them, and by relying upon mere conclusions thought to have a "rational basis" could the Circuit Courts have given credence to alleged employee "expectations of lifetime benefits" before 1974. With all due respect, balancing that kind of defense counsel *post hoc* rationalization, instead of the true historical facts, has nothing to do with assuring "fairness and justice" to a property owner. The Circuit Courts' "rational basis" approach to the Takings Clause takes the word "just" out of it.

At the bottom line of this case, legitimate regulatory power over contracts to choose which set of contractual expectations (i.e. contractual *promises*) must live and which must die, when one or the other must happen, is a given; that is what this Court actually ruled in *Connolly* and *Concrete Pipe*. Those cases do *not* authorize courts to defer to either legislative, or defense counsel rationalizations, about private contractual expectations that never, in fact, existed. Such deference invites and accepts pretextual regulation. Pretextual regulation, requiring a literal transfer of an owner's property, or property transfer regulation justified solely by "*ipse dixit*", is prohibited by the Takings Clause. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

## II.

## THE LOWER COURTS HAVE DECIDED THAT THE TAKINGS CLAUSE PERMITS CONGRESS TO IMPOSE THE COST OF "PLAN LIABILITIES" UPON SELECTED BUSINESSES THAT DID NOT CREATE THEM.

In his dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 19 (1988), Justice Scalia, joined by Justice O'Connor, gave his own view of the objective meaning of the Takings Clause, as follows:

> Its essence, however, is simply the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.

Justice O'Connor, joined in her first opinion by retired Justice Powell, voiced a substantially similar viewpoint in her concurrences to this Court's decisions in *Connolly* and *Concrete Pipe, supra*:

> Imposition of this type of retroactive liability on employers, to be Constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility.

*Concrete Pipe*, 508 U.S. at 647; *Connolly*, 475 U.S. at 228-236.[1]

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1. It is to be noted, in relation to the discussion in the preceding section, that Justice O'Connor's rationality viewpoint was with respect to the *relationship* between the employer's conduct, and the employee's expectations; Justice O'Connor has not said that the *facts* of the employer's conduct, or the *facts* of the employee's expectations themselves are subject only to *rational-basis* review in a Takings Clause case.

The Court should grant review of this case to determine if these objective standards for Takings Clause adjudications, rejected by the Sixth Circuit (no "set formula to review Takings Clause challenges," App. at 18a) should be the law of the land. Beyond this Court's previous statements eschewing any "set standard for Takings Clause adjudications," this Court has never addressed, one way or another, the appropriateness of Justice Scalia's and Justice O'Connor's proposed Takings standards. Moreover, the District Court in this case in particular, which did *not* share in the Sixth Circuit's conclusion that Blue Diamond had generated "legitimate" employee expectations of lifetime benefits, certainly applied a lesser standard, but a standard all the same. Only this Court can and should decide authoritatively where the line between "regulation" and an unjust, uncompensated "taking" of private property should be drawn.

The public initiative of the Coal Act is the assurance of full funding of private employee benefit "plan liabilities," rationally thought to endanger interstate commerce, should those "plan liabilities" not be met. Pub. L. 102-486, Section 19142, App. at 39a. Those private "plan liabilities" had been created in past labor contracts promising lifetime medical benefits from two UMWA benefit funds. *United Mine Workers of America v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3rd Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). *See also*, Conference Report on the Coal Act, 138 Cong. Rec. S17603. As the District Court held, Blue Diamond did not make the "promise" and therefore did not participate in the creation of those contractual entitlements, or "plan liabilities." App. at 24a, 33a, 35a.

Nonetheless, the District Court below, like the Sixth Circuit, held that Blue Diamond did have a relationship with those "plan liabilities" greater than the relationship of the general public as a whole.[2] That relationship consisted solely of Blue Diamond's

2. Ironically, the District Court's viewpoint seems somewhat (Cont'd)

employment of plan beneficiaries between 1947 and 1964 who *later* became entitled to lifetime benefits. Blue Diamond's employment of those beneficiaries was presumably used by the 1974 plan settlors as an eligibility factor for granting entitlements to lifetime benefits. Blue Diamond did nothing to compel or even influence the 1974 contract negotiations that resulted in lifetime benefit entitlements. (This factual inference, required by this Court's summary judgment rules, fully distinguishes this case from the "service credits" analysis of *Concrete Pipe*, 508 U.S. at 638, where the employer had signed a contract granting lifetime benefit entitlements to workers who later met "service" requirements.) Nonetheless, Blue Diamond's employment relationship with the persons receiving those later entitlements, based in part on that past employment relationship, arguably can be said to have "allow[ed]" those persons to become eligible for benefit entitlements at a later date, or to have "contributed to the [Combined Fund's] eventual liability." *Blue Diamond*, App. at 12a, 15a.

By finding this type of non-causal relationship to "plan liabilities" sufficient to pass Takings Clause muster, the lower courts have inescapably drawn a Takings Clause line far more lenient, to the government, and far more adverse to private

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(Cont'd)
inconsistent with another Sixth Circuit conclusion that "the UMWA Fund originated from a federal takeover of the nation's coal mines," another conclusion that Court believed to belie the reasonableness of Blue Diamond's contract expectations of no liability. The Sixth Circuit was both right and wrong; there was a federal takeover of the mines in 1946 that resulted in the progenitor of the UMWA W&R Fund. But, coal companies had a constitutional expectation of federal compensation for that manifest "taking" of their property. *See United States v. Peewee Coal Co.*, 341 U.S. 114 (1951). That right of compensation for the government's interference confirms, rather than destroys, the reasonableness of Blue Diamond's own contractual expectations, as of 1964, of a complete and final divorce from the UMWA W&R Fund without further uncompensated governmental interference.

property interests, than the one suggested by Justices Scalia, O'Connor and Powell. Under the rationale expressed by District Judge Hull, *any* relationship between private activity by a property owner and some social problem, closer than the relationship of the public to that problem, satisfies Takings Clause limitations on the public's power to shift the cost of its programs to private shoulders.

The regulatory takings standard thus drawn is of immense Constitutional importance and should be reviewed by this Court to determine if a fundamental component of our Bill of Rights, *see Dolan v. City of Tigard, supra*, has been properly, or improperly defined below. The Takings Clause literally guarantees economic justice, *i.e.*, "just compensation," to a private property owner whenever the government either takes, *or uses*, his private property in a fashion not shared by the rest of the polity through general taxation. *See Kaiser Aetna v. United States*, 444 U.S. 164, 174, at Footnote 8 (1979); *Pruneyard Shopping Centers v. Robins*, 447 U.S. 74, 83, at Footnote 7 (1980), Rubenfeld, *Usings*, 102 Yale L.J. 1077 (1993). To date, however, this Court has expressed that principal only in terms of preventing "government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227, citing *Armstrong v. United States*, 364 U.S. 40 (1960). That formulation, while consistent with the literal language of the Takings Clause, nonetheless leaves open a non-literal interpretation of that clause as well, wherein it can be seen as guaranteeing nothing more than economic justice for the public as a whole. In other words, if casting public economic burdens onto selected private shoulders can be viewed as "fair and just" *solely* from the public's perspective, because of the selected actor's closer relationship to the problem at hand, then the Takings Clause guarantee has been satisfied no matter how unfair or unjust that imposition might be to the property owner himself. That was apparently District Judge Hull's view.

This Court has never endorsed that line as a standard, and at least three members of this Court have spoken against it. Moreover, the literal language of the Takings Clause itself speaks against it. Economic justice to private property owners, *i.e.*, the "just compensation" guarantee of the Takings Clause, dictates a cause-and-effect relationship between owner activity and a social problem the owners may be called upon, by the public, to correct with their money. More to the point of this case, economic justice to private property owners, such as Blue Diamond, dictates that "plan liabilities" be funded by those who actually created them with their contractual promises, and not by innocent by-standers, like Blue Diamond. The Congress actually thought it was imposing the cost of a *collective bargaining agreement promise* upon those who had made the promise, *see* 138 Cong. Rec. S17603, Conference Report on the Coal Act of October 8, 1992. Accepting that intention at face value, that kind of "regulation" of past promises should be limited, under any reasonable concept of economic justice to private property owners, to the persons who made the promise! *See* Concurring Opinions of Justice O'Conner in *Connolly* and *Concrete Pipe*. Blue Diamond did not make the promise! The Coal Act deprives Blue Diamond of the economic justice guaranteed to it, at the hands of the government, by the Takings Clause.

## CONCLUSION

For the foregoing reasons, Blue Diamond Coal Company respectfully requests this Court to grant the writ of certiorari in this case, and grant full, plenary review.

Respectfully submitted,

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## APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 28, 1996

No. 94-6539

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: BLUE DIAMOND COAL COMPANY,

Debtor.

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BLUE DIAMOND COAL COMPANY,

Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, Donna E. Shalala, ET AL.,

Defendants-Appellees.

ORDER

**BEFORE:** BROWN, MOORE, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

*Appendix A*

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

s/ Leonard Green
Leonard Green, Clerk

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED MARCH 21, 1996

No. 94-6539

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

In re: BLUE DIAMOND COAL COMPANY,

*Debtor.*

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BLUE DIAMOND COAL COMPANY,

*Plaintiff-Appellant,*

*v.*

SECRETARY OF HEALTH AND HUMAN SERVICES, Donna E. Shalala; UNITED MINE WORKERS OF AMERICA, COMBINED BENEFIT FUND, Michael H. Holland, William Hobgood, Marty D. Hudson, Thomas O.S. Rand, Elliott A. Segal, Carlton R. Sickles, and Gail R. Wilensky, Trustees,

*Defendants-Appellees.*

On Appeal from the United States District Court for the Eastern District of Tennessee

Decided and Filed March 21, 1996

Before: BROWN, SILER, and MOORE, Circuit Judges.

*Appendix B*

KAREN NELSON MOORE, Circuit Judge. Plaintiff Appellant Blue Diamond Coal Company ("Blue Diamond") appeals the district court's order granting summary judgment to Defendants-Appellees Donna E. Shalala, Secretary of Health and Human Services (the "Secretary"), and the Trustees of the United Mine Workers of America Combined Benefit Fund (the "Trustees"). Blue Diamond argues that application of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 & 30 U.S.C. §§ 1231-1232 (the "Coal Act"), to Blue Diamond violates substantive due process and is an uncompensated taking. For the reasons stated below, we affirm.

## I

The Coal Act is the culmination of a long history of federal involvement in coal industry labor issues. That involvement began in 1946, when a prolonged coal strike occurred. The federal government took over the operation of the nation's coal mines and entered into an agreement with the United Mine Workers of America ("UMWA"). That agreement, called the Krug-Lewis Agreement, included provisions that required coal producers to provide health and pension benefits to their workers. In 1947, after the mines were returned to their owners, a group of coal producers called the Bituminous Coal Operators' Association, Inc. ("BCOA"), entered into the first National Bituminous Coal Wage Agreement ("NBCWA") collective bargaining agreement with the UMWA. Blue Diamond, although it was not a BCOA member, agreed to be bound by the NBCWA. In that agreement and subsequent agreements, the coal producers agreed to contribute a perton royalty to a fund, similar to the fund established in the Krug-Lewis Agreement, that would pay health benefits and pensions to miners (the "UMWA Fund"). Health benefits were not vested or guaranteed in these early agreements, and the coal producers were not obligated to the

UMWA Fund beyond payment of their assigned royalties. However, the UMWA Fund paid health benefits to miners continuously for more than 30 years.

In 1974, the UMWA Fund was restructured in the wake of the passage of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. The UMWA Fund was divided into two funds, the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan (the "1974 Funds"). For the first time, the 1974 NBCWA contained an explicit promise of lifetime health benefits. The 1974 Funds soon became financially unstable, however, due to a combination of factors. First, many coal producers either went out of business or became non-union, and thus ceased contributing to the 1974 Funds. Second, many miners reached retirement age. Third, health care costs continued to increase. In 1989, the UMWA initiated a 10-month strike against the Pittston Coal Company over retiree benefits, which was settled only with federal intervention. After the Pittston strike was settled, the Secretary of Labor appointed the Advisory Commission on United Mine Workers of America Retiree Health benefits (the "Coal Commission") to study the problems with the 1974 Funds and to propose solutions. The Coal Commission's report was presented to Congress, along with other information, during Congress's deliberations over a legislative solution to the 1974 Funds' problems.

To solve the 1974 Funds' problems, Congress enacted the Coal Act in 1992. Congress's stated purpose for enacting the Coal Act was "... to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to retirees." Coal Industry Retiree Health Benefit Act of 1992, Pub.L. No. 102-486, § 19142, 1992 U.S.C.C.A.N. (106 Stat.) 3036, 3037. The Coal Act

requires all past coal operator NBCWA signatories to finance the benefits to be paid by the "Combined Fund," which the Coal Act created by consolidating the 1974 Funds. 26 U.S.C. §§ 9701(a)(5), 9702, 9704, 9705. Under the Coal Act, the Secretary must identify retired coal miners and their dependents who were entitled to health care benefits under the 1974 Funds and must assign those beneficiaries to NBCWA signatory coal operators that remain in business on the basis of the operators' contractual obligations under the NBCWAs. 26 U.S.C. § 9706. "Eligible beneficiaries" under the Coal Act are coal industry retirees and their dependents who were eligible to receive, and receiving, benefits from either of the 1974 Funds. 26 U.S.C. § 9703(f). The Secretary first must assign eligible beneficiaries to coal mine operators that most recently employed the beneficiaries for at least two years, and were signatories to 1978 or later NBCWAs. 26 U.S.C. § 9706(a)(1). If no such operator exists for a particular beneficiary, the Secretary must assign the beneficiary to an operator that most recently employed the beneficiary and was a signatory to the 1978 or later NBCWAs. 26 U.S.C. § 9706(a)(2). If no such operator exists for a particular beneficiary, the beneficiary must be assigned to a pre-1978 signatory operator, such as Blue Diamond, that employed the beneficary for the longest period of time. 26 U.S.C. § 9706(a)(3). For each beneficiary assigned to it, the coal mine operator must pay a premium to the Combined Fund. 26 U.S.C. § 9704(a).

The Secretary also must assess each NBCWA signatory operator for that operator's proportional share of "orphan" retirees. 26 U.S.C. § 9704(d). "Orphan" retirees, which the Coal Act refers to as "unassigned beneficiaries," are those eligible beneficiaries who cannot be assigned pursuant to any provision of § 9706(a) because their employers have gone out of business. *See* 26 U.S.C. §§ 9703(f), 9704(d). Each coal mine operator's

share of the liability for orphan retirees is proportional to the number of beneficiaries assigned to that operator under § 9706(a) of the Coal Act. Each operator's "applicable percentage" of beneficiaries is determined by dividing the number of beneficiaries assigned under § 9706(a) to that operator by the total number of beneficiaries assigned to all operators under the Coal Act. 26 U.S.C. § 9704(f)(1). Then, the operator is assessed premiums for a percentage of the orphan retirees that is equal to the operator's "applicable percentage" of assigned beneficiaries. 26 U.S.C. 9704(d). Finally, the Coal Act contains provisions for transfer to the Combined Fund of surplus funds from the 1950 UMWA Pension Plan and the Abandoned Mine Reclamation Fund to mitigate the operators' liability for orphan retirees. 26 U.S.C. § 9705(a)(3), (b).

Blue Diamond, a coal mining company located in Knoxville, Tennessee, is a reorganized debtor under Chapter 11 of the Bankruptcy Code. Blue Diamond has been in the coal mining business for more than 50 years. Until 1964, Blue Diamond employed miners who were members of the UMWA, and the company agreed to be bound by the NBCWA collective bargaining agreements between coal producers and the UMWA. Pursuant to those NBCWAs, Blue Diamond contributed per-ton royalties to the then-existing UMWA Fund. In 1964, Blue Diamond stopped employing union miners and terminated its obligations to the UMWA Fund. Blue Diamond has continued to mine coal since 1964 with non-UMWA miners.

The bulk of the 1400 living beneficiaries assigned to Blue Diamond (or their decedents) worked for the company at some point in their careers but retired from other employers. Blue Diamond First Amended Complaint at 7-8, J.A. at 14; Declaration of Donald Pierce at 8, J.A. at 364. Approximately 74

of Blue Diamond's assigned beneficiaries were retired and receiving benefits from the UMWA Fund when Blue Diamond switched to non-union labor in 1964. *Id.* Blue Diamond alleges that its Coal Act premiums will total $4.9 million in the first year, and that the premiums to be paid over the life of the Act have a present value of $25 million.

Blue Diamond sued the Secretary and the Trustees in May 1993, alleging that imposing the liabilities required by the Coal Act on Blue Diamond violated substantive due process and was an uncompensated, and therefore unconstitutional, taking of Blue Diamond's property. The district court granted summary judgment to the Secretary and the Trustees, *In re Blue Diamond Coal Co.*, 174 B.R. 722 (E.D.Tenn. 1994), and Blue Diamond timely appealed.

## II

This court reviews the district court's grant of summary judgment de novo. *Coffey v. Foamex* L.P., 2 F.3d 157, 159 (6th Cir. 1993). Three circuit courts, including the Sixth Circuit, and several district courts have considered challenges to the constitutionality of various provisions of the Coal Act under the Due Process Clause and the Takings Clause. No court has held that the Coal Act violates substantive due process. In *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S.Ct. 64 (1995), this Court held that the Coal Act's failure to provide the same transition payment and withdrawal liability payment credits to former coal mine operators that were provided to current coal mine operators did not violate substantive due process and did not constitute a taking. In *Davon, Inc. v. Shalala*, 1996 WL 28500 (7th Cir. January 25, 1996), a case nearly identical to the instant one, the Seventh

Circuit held that the Coal Act provisions requiring NBCWA signatory operators to pay premiums for assigned and orphan beneficiaries, as applied to pre-1974 signatory coal mine operators, did not violate substantive due process and did not constitute a taking. The Second Circuit upheld the same provisions, as applied to post-1974 signatory coal mine operators, against substantive due process and takings challenges. *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S.Ct. 298 (1995). The district court in *Lindsey Coal Mining Co. v. Shalala*, 901 F. Supp. 959 (W.D.Pa. 1995), again upheld the same provisions, as applied to a pre-1974 signatory coal mine operator, against substantive due process and takings challenges. *See also Holland v. HighTech Collieries, Inc.*, 911 F. Supp. 1021 (N.D.W.Va. 1996) (Coal Act as applied to post-1974 signatory operators and related companies did not violate due process or constitute a taking). However, one district court has held that the Coal Act effected a taking without compensation. In *Unity Real Estate v. Hudson*, 889 F. Supp. 818 (W.D.Pa. 1995), the district court held that the Coal Act, as applied to a corporate successor to signatory operators, did not violate substantive due process but did effect an uncompensated taking.

## III

Blue Diamond argues that the Coal Act violates substantive due process by imposing liability upon Blue Diamond for plan liabilities that were created after Blue Diamond had terminated its relationship with the UMWA Fund. Blue Diamond asserts that no NBCWA that it signed contained an express promise of lifetime health benefits and that only the coal mine operators who signed the 1974 NBCWA or later NBCWAs promised lifetime health benefits. Thus, Blue Diamond argues, it had no part in creating the UMWA members' expectations of

lifetime health benefits, and it should not be required to provide funds to fulfill the promises of lifetime health benefits made by the 1974 signatory operators.

Legislative acts "adjusting the burdens and benefits of economic life" are presumed constitutional. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The Coal Act is classic economic legislation and therefore is presumed to be constitutional. *See Barrick Gold*, 47 F.3d at 836-38 (analyzing Coal Act as economic legislation). Plaintiffs challenging an economic statute on substantive due process grounds have the burden of proving that the statute is arbitrary and irrational—that no rational relationship exists between the statute and a legitimate government objective. Usery, 428 U.S. at 15; *Barrick Gold Exploration, Inc. v. Hudson*, 823 F. Supp. 1395, 1401 (S.D. Ohio 1993), *aff'd*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S.Ct. 64 (1995). Indeed, plaintiffs bringing substantive due process challenges to statutes must traverse "unusually inhospitable legal terrain" because the Supreme Court has not invalidated an economic statute on substantive due process grounds since it decided *Railroad Retirement Board v. Alton R.R.*, 295 U.S. 330, in 1935. In re Chateaugay Corp., 53 F.3d 478, 487 (2d Cir.), *cert. denied*, 116 S.Ct. 298 (1995) (citing numerous cases since Alton in which the Supreme Court has upheld economic legislation). Economic legislation is not unconstitutional under the Due Process Clause "solely because it upsets otherwise settled expectations" or because it "impose[s] a new duty or liability based on past acts. *Concrete Pipe & Products Of California, Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2287 (1993). The legislature need not produce "mathematical precision in the fit between justification and means" when enacting economic legislation. *Id.* at 2288.

*Appendix B*

The deferential standard of review also applies to retroactive economic legislation. *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729 (1984). The Supreme Court described the standards of review of retroactive economic legislation as follows:

> "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." (citation omitted) But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

*Id.* (quoting *Usery*, 428 U.S. at 16-17). "Thus, we must independently analyze the retroactive aspects of the Coal Act's financing provisions and determine whether Congress chose rational means to further its legislative purpose." *Davon*, 1996 WL 28500 at *8.

As applied to Blue Diamond, the Coal Act is very similar to the statute upheld in *Concrete Pipe*. In *Concrete Pipe*, the plaintiff was a contributing employer to a multiemployer pension fund. After the plaintiff began contributing to the pension fund, the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub.L. No. 96-364, 1980 U.S.C.C.A.N. (94 Stat.) 1208, was enacted. The MPPAA imposed withdrawal liability upon employers who ceased contributing to the pension fund. *Concrete Pipe*, 113 S.Ct. at 2286. The plaintiff then

withdrew from the pension fund and argued that the imposition of withdrawal liability upon it violated substantive due process because no withdrawal liability existed when the plaintiff entered into its agreement to fund the pension plan. *Id* at 2286-87. The plaintiff also argued that the statute was irrational as applied because the plaintiff company did not contribute to the pension fund long enough for any of its employees to earn vested benefits. *Id.* at 2287. The court dismissed both arguments, stating that the "retroactivity" of the statute was not irrational, and the fact that the plaintiff had provided its employees with service credits that would lead to eventual vesting contributed to the plan's probable liability and therefore was a rational basis upon which to impose withdrawal liability. *Id.* at 2287-88.

Like the plaintiff in *Concrete Pipe*, Blue Diamond argues that it is irrational to apply the Coal Act to Blue Diamond because Blue Diamond's employees did not have vested rights in the UMWA Fund while Blue Diamond contributed to the UMWA Fund. However, the UMWA Fund, like the fund at issue in *Concrete Pipe*, was a multiemployer fund that paid benefits on the basis of service with any union employer. Blue Diamond, like the plaintiff in *Concrete Pipe*, provided service credits to its union employees that contributed to the fund's eventual liability to those union employees. Therefore, Blue Diamond contributed to the UMWA Fund's liabilities and provided a rational basis for Congress to impose Coal Act liability upon it.

Blue Diamond further argues that it was irrational for Congress to impose Coal Act liability upon Blue Diamond because Blue Diamond did not promise its employees that they would receive lifetime health benefits. It is undisputed that the NBCWAs did not contain an explicit promise of lifetime benefits until the 1974 NBCWA agreement. However, several federal

courts have found that UMWA members had a legitimate expectation of lifetime benefits before the 1974 NBCWA, based on the various funds' more than 30-year history of continuous payment of benefits and the statements, of coal industry officials. *Davon*, 1996 WL 28500 at *9 ("Congress could rationally have concluded that such participation [in the NBCWA benefit funds] led to a legitimate expectation of lifetime benefits."). *See also Templeton Coal*, 882 F. Supp. at 825 (describing basis for lifetime benefits expectation). Congress certainly had a rational basis for concluding that all NBCWA signatories and "me-too" operators who agreed to be bound by the NBCWAs, including Blue Diamond, contributed toward the legitimate expectations of the UMWA members. As the Seventh Circuit found in *Davon*:

> . . . [Every NBCWA signatory company shared some responsibility in creating a legitimate expectation among miners of lifetime health benefits. . . . [T]he fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefits. The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s, even though it is not explicit in any NBCWA until 1974. Even if no such promise was made, every NBCWA contributed to the expectation by creating a continuous mechanism for providing UMWA multiemployer-sponsored health benefit plans. . . . Plaintiffs were part of this tradition and can rationally be said to have

> contributed to a reasonable exception of lifetime health benefits.

*Davon*, 1996 WL 28500 at *9.

Even if Blue Diamond did not specifically create the UMWA members' expectations of lifetime coverage or if those expectations were not reasonable, Congress could still impose Coal Act liability on Blue Diamond because of Blue Diamond's direct contributions to the Combined Fund's liability. *See United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (joint and several liability for cleanup costs imposed upon waste generators whose waste caused pollution at site did not violate due process). As discussed above, Blue Diamond directly contributed to the Combined Fund's liabilities by providing service credits to its former employees. *See Concrete Pipe*, 113 S.Ct. at 2287-88 (imposition of withdrawal liability rational when employer has provided its employees with service credits, even though its employees' benefits were not vested). In light of the deferential standard of review applicable to economic legislation, Congress is not required to choose what a court might find to be the best or fairest system of regulation, nor is Congress required to tailor precisely its means to its desired ends. *Concrete Pipe*, 113 S.Ct. at 2288. The fact that Blue Diamond never explicitly promised its employees lifetime benefits and never signed an NBCWA that contained an explicit promise of lifetime benefits is not dispositive, because Congress's power to regulate is not limited by the terms of private contracts. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986) ("'Contracts, however express, cannot fetter the constitutional authority of Congress.'... If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be

defeated by private contractual provisions.") (quoting *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935)). Moreover, a contractual promise of lifetime benefits is not a "prerequisite" of a congressional finding that a party bears some responsibility for the expectations created by its past conduct. *Davon*, 1996 WL 28500 at *10.

Even if the liability imposed by the Coal Act is considered "retroactive" as argued by Blue Diamond, the Coal Act still withstands substantive due process scrutiny. The Coal Act, as applied to Blue Diamond, is retroactive legislation in the sense that it imposes a new duty of payments to the Combined Fund based on each signatory operator's act of participating in a previous and expired NBCWA. *See Davon*, 1996 WL 28500 at *6 (finding that Coal Act is retroactive as applied to pre-1974 signatory operator). However, the retroactive aspects of the Coal Act themselves are justified by a rational purpose, and the substantive due process precedents require no more. Gray, 467 U.S. at 730. In this case, Blue Diamond's past conduct of providing service credits to its former UMWA employees directly contributed to the Combined Fund's ultimate liabilities by allowing Blue Diamond's former employees to become eligible for benefits from the predecessor funds. Certainly it is rational for Congress to impose a retroactive payment burden on those who directly contributed to the liabilities at issue. *See Monsanto*, 858 F.2d at 174 (retroactive imposition of liability for cleanup costs upon waste generators did not violate due process).

Also, Blue Diamond, like every other coal mine operator who participated in the NBCWAs, profited from the labor of the retired miners that the company once employed. *See Davon*, 1996 WL 28500 at *8. Thus, Congress rationally could hold Blue Diamond partially responsible for paying health benefits for its

former employees and their dependents. The Supreme Court approved a similar rationale for retroactive legislation in *Usery*. In that case, the Court held that legislation imposing retroactive liability upon coal mine operators for their former employees' black lung disease was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . ." *Usery*, 428 U.S. at 18. *See also Monsanto*, 858 F.2d at 174 (Congress acted rationally in imposing retroactive liability on waste generators who "profited from inexpensive waste disposal methods that may have been technically 'legal' prior to CERCLA's enactment.").

The Coal Act's imposition of retroactive liability for orphan retirees likewise passes substantive due process muster. Although Blue Diamond did not profit directly from the orphans' labor, it was rational for Congress to require all NBCWA coal mine operators, who each profited from the retired miners' labor, to share responsibility for the industry-wide problem of orphan retiree benefits. *See Davon*, 1996 WL 28500 at *9 ("Given that plaintiffs benefitted from the labor of retired mine workers the same as companies still operating in the coal industry, it was rational for Congress to require all contributing coal companies to share responsibility for 'orphan' beneficiaries."). Blue Diamond and the other NBCWA operators also profited from the labor peace and employee benefits obtained by the existence of the various funds, making it rational for Congress to require all of the NBCWA operators to participate in providing sufficient financing to cover all of the Combined Fund's beneficiaries. All employers who contribute to a multiemployer benefit plan share some responsibility for the plan's liabilities. As the Supreme Court stated in *Concrete Pipe:*

> But this argument [that the plaintiff should

> not have to pay a share of the vested benefits of other companies' employees] simply ignores the nature of multiemployer plans, which . . . operate by pooling contributions and liabilities. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone.

113 S.Ct. at 2287.

Moreover, Congress chose a logical scheme to finance orphan retirees' health benefits by imposing liability in proportion to each operator's number of assigned beneficiaries, and by including provisions to mitigate liability for orphans' benefits. 26 U.S.C. §§ 9704(d); 9705(a)(3), (b). Under these circumstances, Congress's imposition of retroactive liability for orphan retirees' benefits is rational. *See Davon*, 1996 WL 28500 at *9. Because there is a rational basis for imposing Coal Act liability upon Blue Diamond, the Coal Act as applied to Blue Diamond does not violate substantive due process.

## IV

On another constitutional front, Blue Diamond argues that a legislative monetary assessment, such as the Coal Act, that is intended to finance liabilities not created by Blue Diamond, is a "taking" that must be compensated. The Takings Clause of the Fifth Amendment reads in pertinent part, ". . . nor shall private property be taken for public use, without just compensation." The main purpose of the Takings Clause is "'to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole.' " *Penn Central Transportation Co. v. City of New York,*

438 U.S. 104, 123-24 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Supreme Court, however, has not established any set formula to review Takings Clause challenges, and has engaged in "essentially ad hoc factual inquiries" to determine whether statutes effect takings. *Penn Central*, 438 U.S. at 124. The Court has identified three factors that have "particular significance" in the takings inquiry:

> (1) the economic impact of the regulation on the claimant;
>
> (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and
>
> (3) the character of the governmental action.

*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986) (quoting *Penn Central*, 438 U.S. at 124).

*Connolly* involved a Takings Clause challenge to the MPPAA, a statute similar to the Coal Act in that it regulated multiemployer benefit plans by imposing retroactive withdrawal liability. In *Connolly*, the Court assessed the three factors and held that the MPPAA did not constitute a taking. The severity of the economic impact factor weighed against a taking finding, because the plaintiff's liability was proportionate to the plaintiff's relationship with the pension plan at issue. *Connolly*, 475 U.S. at 225. The interference with reasonable investment backed expectations factor also weighed against a taking finding because, although the contracts signed by the plaintiff did not include withdrawal liability, the plaintiff voluntarily entered a

heavily regulated field and had notice that withdrawal from the fund might trigger additional liabilities. *Id.* at 226-27. The nature of the government's action weighed against finding a taking, because the government did not physically invade the plaintiff's assets or permanently appropriate them for its own use. *Id.* at 225.

Blue Diamond's Takings Clause challenge to the Coal Act fares no better than did the plaintiff's challenge in *Connolly*. In this case, the district court found that the economic impact factor favored Blue Diamond, but focused solely on the costs imposed upon Blue Diamond by the Coal Act. The proper question is not, however, merely the size of the company's liability under the Act. The Supreme Court has stated that the proper inquiry under the economic impact prong of the takings inquiry in a multiemployer benefit plan context is whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue. *Connolly*, 475 U.S. at 225. *See also Davon*, 1996 WL 28500 at *12 ("The first *Connolly* factor turns on the question of proportionality."). Blue Diamond's liability under the Coal Act is at least roughly proportional to Blue Diamond's experience with the UMWA Fund. Nearly all of the approximately 1400 living beneficiaries assigned to Blue Diamond either worked for Blue Diamond or were related to someone who worked for Blue Diamond, and Blue Diamond provided service credits to those employees. The beneficiaries assigned to Blue Diamond were assigned to Blue Diamond only after they could not be assigned to a signatory to a more recent NBCWA. And although the Coal Act requires Blue Diamond also to pay a portion of the costs for the orphan retirees, the Coal Act relates Blue Diamond's assessment for orphan retirees to Blue Diamond's experience with the UMWA Fund. *See Davon*, 1996 WL 28500 at *12 (noting that the Coal Act's assessments for

orphan retirees are related to operators' experiences with the fund because they are made in proportion to the number of beneficiaries assigned to each operator).

Moreover, the Coal Act contains provisions that moderate the impact of the liability for orphans so that liability more closely approximates the operators' experiences with the UMWA Fund. For example, the Coal Act causes funds remaining in the 1950 UMWA Pension Plan and funds collected under the Abandoned Mine Reclamation Act to be paid to the Combined Fund. 26 U. S. C. § 9705(a)(3), (b). *See Davon*, 1996 WL 28500 at * 12 (noting that the Coal Act mitigates each operator's liability for orphan retirees by transferring funds to the Combined Fund, thus reducing the economic impact on individual operators). See Connolly, 475 U.S. at 225-26 (noting that mitigating provisions keep employer's liability proportionate to its experience with the plan, and help keep the economic impact of the MPPAA from constituting a taking). These mitigating transfer payments in fact were sufficient to cover the first two years of Blue Diamond's liability to orphan retirees. Declaration of Donald E. Pierce, J.A. at 357; *see also Chateaugay*, 53 F.3d at 486.

Although it is a closer question, the Coal Act as applied to Blue Diamond does not interfere with reasonable investment-backed expectations in a way that weighs in favor of a takings finding. The federal government pervasively regulates the coal mining industry, the UMWA Fund originated from a federal takeover of the nation's coal mines, and federal intervention has been required to settle strikes over benefits issues. Given these circumstances, Blue Diamond cannot argue that it was reasonable for Blue Diamond to believe that Congress would never intervene in the management of the UMWA Fund or its

successor funds. *See Davon,* 1996 WL 28500 at *13 (government involvement in coal industry put coal operators on notice that government might intervene in benefit funds).

Moreover, Blue Diamond also participated in the NBCWA system that fostered UMWA members' legitimate expectations of lifetime benefits, as discussed above. Thus, Blue Diamond's expectation that it would not be required to fund lifetime health benefits was not reasonable. *See Davon,* 1996 WL 28500 at *14. (pre-1974 signatory operators' participation in NBCWA system made expectation that operators would not be liable for future benefits unreasonable). Blue Diamond argues that it expected Congress to impose the costs of "bailing out" the UMWA Fund upon the general public. Such expectations clearly were unreasonable. As the Second Circuit stated in holding that the Coal Act did not constitute a taking:

> [W]e reject [plaintiff's] contention that it was reasonable to expect to be held no more accountable than society at large for the health care of its retired coal miners. . . . In light of the fact that [plaintiff] benefitted enormously from the Wage Agreements, from the labor of its former employees, and from the promise of lifetime health benefits that in part attracted them, any interference wrought by the Coal Act with [plaintiff's] expectations was interference with unreasonable, not reasonable, expectations.

*Chateaugay,* 53 F.3d at 495-96.

Finally, the character of the Coal Act is identical to the

character of the MPPAA—the Coal Act does not physically invade the plaintiff's assets or permanently appropriate them for the government's own use but instead requires payment to a private benefit fund. *See Davon*, 1996 WL 28500 at *14 (". . . we find the Coal Act indistinguishable [in character] from the MPPAA sustained in Connolly and Concrete Pipe."); *Chateaugay*, 53 F.3d at 496 ("the Coal Act entails no physical invasion of property, nor any permanent confiscation of [plaintiff's] assets for governmental use."). *Compare Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the Court found a taking where interest earned on interpleader funds deposited with a court was appropriated by the county).

Blue Diamond cannot show that the Coal Act had a disproportionate economic impact upon the company. The Coal Act does not appropriate private property for governmental use and does not interfere with any of Blue Diamond's reasonable investment-backed expectations. In sum, none of the significant factors in the Takings Clause inquiry favors Blue Diamond.

## V

The Coal Act, as applied to Blue Diamond, is neither a violation of substantive due process nor an unconstitutional taking. Blue Diamond thus cannot meet its heavy burden of proving that the Coal Act as applied to it is unconstitutional, even under the facts as alleged by Blue Diamond. Therefore, the district court's order granting summary judgment to the appellees is **AFFIRMED.**

## APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE FILED NOVEMBER 9, 1994

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. CIV-3-93-473

IN RE: BLUE DIAMOND COAL COMPANY, Debtor

BLUE DIAMOND COAL COMPANY

v.

DONNA E. SHALALA, Secretary of Health and Human Services, and ... TRUSTEES OF THE UNITED MINE WORKERS' OF AMERICA COMBINED BENEFIT FUND

### OPINION

This is an adversary proceeding in which Blue Diamond Coal Company, a reorganized Chapter 11 Debtor, challenges the constitutionality of the "super-reachback" provision of the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), 26 U.S.C. §§9704(a)(3). All parties have moved for summary judgment; the issues have been fully briefed; and the case was heard on oral argument on Monday November 7, 1994. The Court makes the findings of fact and conclusions of law which follow.

*Appendix C*

## I. BACKGROUND

Blue Diamond runs bituminous coal mining and mining-related operations in Kentucky and Tennessee through several wholly-owned subsidiary companies. Between 1947 and 1964, Blue Diamond employed members of the United Mine Workers of America (UMWA)[1] and, pursuant to various National Bituminous Coal Wage Agreements (NBCWAs), made contractually defined royalty payments to a multiemployer welfare and retirement fund that operated on a pay-as-you-go basis. This fund promised its beneficiaries no permanent or perpetual benefits. In fact, beneficiaries of this plan were specifically told that benefits were revocable and not vested. The continuation of benefits at any future time was entirely contingent upon the receipt of sufficient tonnage royalty revenues from the participating operators. Blue Diamond's last UMWA contract expired in April of 1964. Since that time, it has made no contributions to any UMWA benefit trust or done anything which would give any of its current or former employees a reasonable expectation of lifetime health benefits from any UMWA trust funds.

In response to the passage of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381, mandating that pension funds be fully funded on an actuarial basis, the National Bituminous Coal Wage Agreement of 1974

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1. The United Mine Workers of America is a labor organization representing coal industry mine workers throughout North America. For more than forty years, it has entered into a series of successive collective bargaining agreements known as National Bituminous Coal Wage Agreements with the Bituminous Coal Operators' Association, Inc., a multiemployer bargaining association established in 1951 that represents various large and small bituminous coal operators in collective bargaining with the UMWA.

restructured the existing UMWA benefit trust, dividing it into four separate trusts, only two of which are relevant to this lawsuit. One was the UMWA 1950 Benefit Plan and Trust which provided health benefits to miners who retired before January 1, 1976, and their dependents, including retirees from Blue Diamond. The other was the UMWA 1974 Benefit Plan and Trust which provided health benefits to both active miners and miners who retired after January 1, 1976, and their dependents.

By the late 1970s, a combination of demographic and economic factors began to adversely impact the financial stability of these UMWA benefit trusts. In the 1980s, many coal companies went out of business or otherwise ceased contributing to the funds, effectively dumping their retirees into the beneficiary population and forcing the remaining, participating employers to shoulder increasingly large contribution obligations to pay not only for their own retirees but also for these newly "orphaned" retirees. The increasing financial instability of the trusts, coupled with the economic disruption heralded by the strike of the Pittson Coal Company, lead Congress to seek a legislative solution to the problem. In March of 1990, then-Secretary of Labor Elizabeth Dole established the bi-partisan Advisory Commission on Mine Workers Retiree Health Benefits which eventually produced the Coal Commission Report. The Coal Commission found, among other things, that the retired miners were entitled to the health care benefits that had been promised to them and that such commitments must be honored. It recommended either an industry-wide funding plan broadly taxing all current coal operators, or a more limited arrangement funded by past and present NBCWA signatories only — possibly reaching back to the "signatory class of 1978." The report did not suggest that pre-ERISA signatories of NBCWAs like Blue Diamond had ever

promised lifetime health care benefits or that they should be included in the "reach back" provision.

The Coal Act which eventually passed is undeniably good legislation designed to ensure the continuation of health benefits for tens of thousands of retired coal miners and their dependents.[2] It seeks to rescue from insolvency the two UMWA Welfare Benefit Trust Funds which were established in 1974, after the passage of ERISA. It does so by combining the two funds into a newly created "Combined Fund" and requiring *all* past employer signatories to NBCWAs to finance the Combined Fund's benefits. In other words, the legislation goes beyond the reachback suggested by the Coal Commission, which would have involved only post-ERISA signatories of collective bargaining agreements, to encompass coal companies such as Blue Diamond that have not signed NBCWAs since well before ERISA required vested benefits.

The Coal Act requires the Secretary of Health and Human Services to identify retired coal mine employees and their dependents who were entitled to health care benefits under the 1950 UMWA Benefit Fund and the 1974 Benefit Fund and to assign those beneficiaries to coal operators, such as Blue Diamond, on the basis of the operators' former contractual obligations to the former welfare retirement funds. The Coal Act imposes its obligations in proportion to a signatory operator's past experience in the industry and, under its assignment hierarchy, implicitly recognizes that coal operators signing post-ERISA collective bargaining agreements should bear the responsibility, in the first instance, for UMWA retiree health benefits. Only when the Secretary cannot assign a beneficiary to

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2. The Coal Act does not provide health benefits to coal industry retirees who were never members of the United Mine Workers of America.

a more recent signatory does the Act look to pre-ERISA coal operators, such as Blue Diamond, to make beneficiary assignments. In addition, under the Coal Act, the Secretary may also assess Blue Diamond, and other operators, additional premiums, over and above the premiums assessed for beneficiaries specifically assigned to them, for their proportional share of "orphans," a class of beneficiaries with respect to whom the Secretary is unable to make assignments to specific coal operators. Of the 1,133 miners currently assigned to Blue Diamond by the Secretary, only 74 had actually retired from Blue Diamond when its last UMWA contract expired in 1964. (These retirees have been receiving health benefits from the UMWA 1950 Benefit Fund for the last twenty-eight years). The bulk of the retirees currently assigned to Blue Diamond worked for it at some point in their careers but actually retired from other employers.

## II. THIS CASE

In this lawsuit, Blue Diamond alleges that the Secretary's imposition of assessments will cost it $4.9 Million Dollars in its first year alone; that its potential liability is approximately $25 Million Dollars; and that the Act deprives it of property without due process of law, and without just compensation, in violation of the Due Process and "Takings" clauses of the Fifth Amendment to the United States Constitution. It also charges that the Coal Act retroactively deprives it of legitimate contractual expectations, effectively rewriting long-expired UMWA wage agreements and requiring it to pay more compensation to its former employees than originally bargained for. It likens the Coal Act, as applied, to a retroactive minimum wage law that would require employers to give *former* employees a raise.

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The Coal Act is predicated on a congressional finding that,

> in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal Industry to identify *persons most responsible for plan liabilities* in order to stabilize plan funding and allow for the provision of health care benefits to such retirees. Pub. L. 102-486, Section 19142. (emphasis added)

Blue Diamond's entire argument is that, if a coal operator never signed an NBCWA after 1974, it cannot possibly be one of the "persons most responsible" for the liabilities of the two post-ERISA trust funds the plan seeks to salvage. It points out that the Coal Commission recommended the legislation because it found that the miners had been *promised* lifetime benefits and that this commitment should be honored. Only those employer signatories to post-ERISA NBCWAs can be said to have ever actually promised lifetime health benefits to their retirees and their dependents. Blue Diamond contends that, unless it can be shown to have caused the liability of the UMWA health care programs by contractually promising retirement health care benefits, the Constitution prohibits Congress from retroactively holding it responsible for funding those benefits now in any manner other than a general tax upon society as a whole. In other words, it would have this Court find that it is unconstitutional to assign beneficiaries and assessments of premium liabilities to pre-ERISA signatories of contracts with the UMWA who never promised lifetime health benefits to their UMWA retirees.

## *Appendix C*

### *A. The Due Process Challenge*

The Due Process Clause of the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." In considering Due Process challenges to economic legislation, the Supreme Court has held repeatedly that such legislation must be sustained unless Congress has acted arbitrarily or irrationally. "[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). This deferential standard applies even if the legislation readjusting benefits and burdens upsets otherwise settled expectations or imposes a new duty or liability based on past acts. *See: Turner Elkhorn*, 428 U.S. at 16. As long as "a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefits Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984).

What these cases tell us is that, in order to mount a successful Due Process challenge to the Coal Act's super-reachback provision, Blue Diamond must show that there is no rational relationship between that part of the legislation and an appropriate government goal. In other words, it must show that there is nothing in its past conduct that would make it rational to consider it "responsible" for the "plan liabilities." This it cannot do. The best Blue Diamond can do is show that, in extending the reachback provision beyond that recommended by the Coal Commission, Congress apparently erroneously believed that

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Blue Diamond and other contributors to pre-ERISA welfare and retirement funds had actually or effectively promised lifetime benefits to retirees and their beneficiaries. However, the actual Congressional finding which is mentioned in the legislation is not that Blue Diamond and others like it had actually *promised* benefits but that they bore "responsibility" for the "plan liabilities." There is no doubt that, to some extent, they did. By ceasing to contribute to the UMWA trust fund after its contractual requirement to do so had expired, Blue Diamond created some of the "orphans" who became the responsibility of the remaining contributing operators. These orphaned miners continued to draw upon the funds and contributed to their financial instability.

The *Turner Elkhorn* case is highly instructive here. That case involved a Due Process challenge to the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972. In that legislation, Congress required coal operators to pay the medical costs of their former employees who were suffering from black lung disease, even though these employees had terminated their work in the industry before the Act was passed and even though the operators had never contracted to pay such compensation. The Supreme Court found that the Black Lung Benefits Act rationally spread the costs of the employees' disabilities to those who had profited from their labor. The same reasoning can be applied to the facts of this case. Congress has chosen to spread the costs of the Combined Fund's benefits to those employers who had profited from the labor of UMWA miners and who, at some time in their histories, had contributed to multi-employer welfare benefit funds.

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*B. The Takings Clause Challenge*

The Takings Clause of the Fifth Amendment prohibits the government from taking property for public use without paying the former owner just compensation. It is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). However, there are "a wide variety of contexts . . . [in which] government may execute laws or programs that adversely affect recognized economic values." *Id.* at 124. "[V]ested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life." *United States v. Locke*, 471 U.S. 84, 105 (1985). There is no set formula for determining whether economic legislation violates the Takings Clause. Courts normally consider the economic impact of the regulation on the challenging party; the extent to which the regulation has interferred with its distinct investment-backed expectations; and the character of the governmental action. *See Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 225 (1986).

The *Connolly* case involved an unsuccessful Takings Clause challenge to the "withdrawal liability" amendments to ERISA in the Multiemployer Pension Plan Amendments Act of 1980 (MMPAA). After carefully considering the regulatory takings factors, the Supreme Court found that the MMPAA did not constitute a taking, even though the employees who benefitted from the Act's requirements might have had no employment relationship whatsoever with the employer affected by the law. The Court found that, the MMPAA's "interference with the

property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and . . . does not constitute a taking requiring Government compensation." 475 U.S. at 225. The Court made similar findings in another Takings Clause challenge, *Concrete Pipe & Products of California. Inc. v. Construction Laborers Pension Trust*, __ U.S. __, 113 S.Ct. 2264 (1993). The reasoning in the *Connolly* and *Concrete Pipe* cases can, of course, be applied to the facts of the instant case. However, it is important to note that in both *Connolly* and *Concrete Pipe*, the plaintiffs had voluntarily participated in ERISA-regulated, "defined benefit" pension plans at a time when contingent employer withdrawal liability for unfunded vested benefits was already imposed by the ERISA law as it existed when the plaintiffs signed up. The challenged amendments in the MMPAA simply made employer withdrawal liability automatic and unlimited, immediately upon an employer's withdrawal from a multi-employer defined benefit plan. The "taking" in those cases was upheld because of the employers' previous association with their ERISA plans.

In order to survive a Takings Clause challenge under the terms of both *Connolly* and *Concrete Pipe*, the Coal Act must rest on some conduct on Blue Diamond's part that would make it rational to hold it responsible for the health benefits to be covered by the Combined Fund. Blue Diamond's conduct, that subjects it to liability under the Coal Act, consisted of employing UMWA members between 1947 and 1964, and making contractually defined and limited royalty contributions to a multiemployer welfare and retirement fund that operated on a pay-as-you-go basis. It is not at all clear that this is a constitutionally sufficient basis for liability. In the Court's opinion, Blue Diamond's Takings Clause challenge has considerable appeal.

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Of the three factors found by the *Connolly* court to be of particular significance to a Takings Clause challenge, the first is, of course, the economic impact of the regulation upon the claimant. It is undisputed that the Coal Act "takes" $4.9 Million Dollars of Blue Diamond's money in the first year alone and it may end up taking as much as $25 Million before Blue Diamond's assigned beneficiaries expire. This is a gross, uncompensated taking whose severe economic impact must be recognized. Any analysis of the first factor must strongly support Blue Diamond's position.

The second *Connolly* factor is the extent to which the regulation has interferred with distinct investment-backed expectations. The Secretary suggests that it was unreasonable for Blue Diamond to believe that its 1964 National Bituminous Coal Wage Agreement would forever limit its responsibility to the UMWA benefit trusts. Maintaining economic stability in the coal industry has long been a matter of federal concern. Blue Diamond should not be surprised that Congress acted in 1992 to avert the crisis in the 1950 and 1974 Benefit Trusts which threatened to disrupt coal production and deprive UMWA retired miners of their long-expected lifetime health benefits. The Court agrees that it was reasonably foreseeable that Congress would take action to ensure that the UMWA benefit trust would remain solvent and capable of meeting its obligations. But it was a good deal less foreseeable that the legislation chosen to solve the problem would reach back to conduct which occurred almost 30 ago in order to enforce a "promise" Blue Diamond never actually made. The best that can be said for the Secretary's argument is that Blue Diamond had to have known that its own retirees were among the many "orphans" drawing benefits from the UMWA trusts and contributing to their financial instability. The second factor also favors Blue Diamond, but less emphatically.

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The third factor to be considered is the "character" of the Coal Act. The Secretary suggests that the nature of the governmental action in the Coal Act is indistinguishable from the MPPAA withdrawal liability provisions which the Supreme Court found not to constitute a taking in *Connolly*. She points out that neither MPPAA nor the Coal Act permits the government to physically invade or permanently appropriate any of the employer's assets for its own use. Rather, both statutes implement a "public program that adjusts the benefits and burdens of economic life to promote the common good" and therefore do not constitute a taking requiring government compensation. The defendant Trustees, in their brief, also point out that, to the maximum extent possible, the Coal Act imposes liability that is directly related to the employment relationship between each assigned operator and the Combined Fund's beneficiaries. With regard to the assignment of "orphans," they suggest that Congress carefully weighed the alternatives and expressly determined that the costs of providing health care for orphan retirees would be most fairly borne by those NBCWA coal operators who voluntarily chose to participate in a multiemployer health care system and presumptively derived a *quid pro quo* in collective bargaining from their agreement to do so.

With regard to the Secretary's assignment of retirees who actually worked for it in the past, Blue Diamond concedes that it has received the "fruits of their labor" (echoing the legal basis upon which a Takings Clause challenge failed in the *Turner Elkorn* case). However, it points out that the Combined Fund created by the Coal Act also provides benefits to wives, widows and dependents of miners who never worked in the coal mines. It has not enjoyed the fruits of *their* labor. Blue Diamond contends, generally, that the true "character" of the Coal Act, as applied to

it, is that of a statute justifying a gross property deprivation solely by means of a fiction — a presumed promise of benefits which was never actually made.

The Court fully understands Blue Diamond's argument that it made no promise of lifetime benefits and, therefore, did not contribute to the UMWA benefit funds' legal liability. But it *did* contribute to the problem which the Coal Act attempts to solve because its own retirees are beneficiaries of the Combined Fund. The Court is mindful that the Takings Clause is designed to bar the government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. And it is by no means clear that, in all fairness and justice, the public rather than past and present NBCWA signatories, should shoulder the responsibility for rescuing the 1950 and 1974 UMWA Benefit Trusts and for ensuring that retired UMWA miners receive the lifetime health benefits promised to them by later NBCWA signatories. It is a coal industry problem which should be solved by the coal industry. Coal operators like Blue Diamond contributed to the problem and should be part of the solution. In other words, an analysis of the third *Connolly* factor favors upholding the constitutionality of the challenged legislation.

The Court notes that the constitutionality of the Coal Act has already been subjected to Due Process and Takings Clause challenges in *LTV Steel Co., Inc. v. Shalala (In re Chateaugay)*, 163 B.R. 955 (S.D.N.Y. 1993); *Templeton Coal Co. v. Shalala*, 855 F. Supp. 990 (S.D. Ind. 1993); and *Barrick Gold Exploration, inc. v. Hudson*, 823 F. Supp. 1395 (S.D. Ohio, 1993). All three district courts upheld the constitutionality of the Coal Act. The *LTV Steel* and *Barrick* cases were not brought by operators who, like Blue Diamond, have been nonunion since

before 1974. However, the Templeton case, like the one before this Court, was brought by operators who last signed NBCWAs in the 1950s and early 1960s.

The *Templeton* court applied the three *Connolly* factors and felt that the plaintiffs' showing under their Takings Clause challenge was insufficient to justify issuing a preliminary injunction. But it pointed out that it was making its ruling in the "exaggeratedly rapid atmosphere of a preliminary injunction proceeding." 855 F. Supp. at 1004. It suggested that the super-reachback provisions of the Coal Act must be "at the very edge of the broad range of permissible legislative allocation of specific economic burdens . . . perhaps . . . over the edge." *Id.* The *Templeton* court continued,

> The imposition of retiree health care costs on the Plaintiffs now, thirty or forty years after their exit from the industry, certainly has a draconian air about it. By no means does the court view the Plaintiffs' challenge to the Coal Act as a frivolous attack. However, the character of the decision to allocate responsibility for this economic burden to former participants in the industry does not seem to be different in character from the liability constitutionally imposed for Black Lung disease benefits, pension funding, and environmental contamination as discussed in the cases cited above. *Id.*

This Court has no more idea than the *Templeton* court where the line should be drawn in constitutional challenges to economic legislation. If the super-reachback provision of the

Coal Act does not cross the line, it must step right up to it. Nevertheless, the Coal Act must be viewed as a rational legislative response to a crisis in coal retiree health benefits. It is the product of legislative thought, analysis and compromise and there is no evidence that Congress acted arbitrarily or without prior substantive investigation and debate. The fact that Blue Diamond ceased contributing to UMWA benefit trusts in 1964, should not relieve it of responsibility in this instance. It would be unfair if the lifetime health care costs of Blue Diamond's own retirees were to be born by its competitors in the coal industry. And, although the Coal Act also requires Blue Diamond to pay a proportionate share of financing the health care benefits of orphan retirees, who never were its employees, this aspect of the statute is, in fact, very similar to provisions already found constitutional in the MMPAA. Congress has weighed the alternatives and rationally determined that the costs of providing such benefits for orphan retirees should be borne by NBCWA coal operators who, at least at one time, voluntarily chose to participate in a multiemployer health care system.

III. CONCLUSION

In conclusion, the Court FINDS that the super-reachback provision of the Coal Act violates neither the Due Process nor the Takings Clause of the Fifth Amendment to the United States Constitution. Blue Diamond's motion for summary judgment will be denied and the motions filed by the Secretary of Health and Human Services and by the Trustees of the Combined Fund will be granted.

ENTER:

s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

*Appendix C*

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. CIV-3-93-473

IN RE: BLUE DIAMOND COAL COMPANY, Debtor

BLUE DIAMOND COAL COMPANY

v.

DONNA E. SHALALA, Secretary of Health and Human Services, and ... TRUSTEES OF THE UNITED MINE WORKERS' OF AMERICA COMBINED BENEFIT FUND

ORDER

Pursuant to an Opinion this day passed to the Clerk for filing, Blue Diamond's motion for summary judgment is DENIED; the motions filed by the Secretary of Health and Human Services and by the Trustees of the Combined Benefit Fund are hereby GRANTED; and this action is DISMISSED.

ENTER:

s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

## APPENDIX D — RELEVANT STATUTES

### Pub. L. 102-486, Section 19142

**Findings and Declaration of Policy**

"**(a) Findings.** The Congress Finds that—

"**(1)** the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

"**(2)** in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

"**(b) Statement of policy.**—It is the policy of this subtitle [enacting this subtitle, amending sections 1231 and 1232 of Title 30, Mineral Lands and Mining, and enacting provisions set out as a note under section 1 of this title]—

"**(1)** to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

"**(2)** to allow for sufficient operating assets for such plans; and

"**(3)** to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans."

*Appendix D*

**26 U.S.C. § 9701, *et seq.***

SUBCHAPTER A—DEFINITIONS OF GENERAL APPLICABILITY

**§ 9701. Definitions of general applicability**

**(a) Plans and funds.**—For purposes of this chapter—

**(1) UMWA Benefit Plan. —**

**(A) In general.**—The term "UMWA Benefit Plan" means a plan—

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

**(B) 1950 UMWA Benefit Plan.**—The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

**(C) 1974 UMWA Benefit Plan.**—The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

**(2) 1950 UMWA Pension Plan.**—The term "1950 UMWA Pension Plan" means a pension plan described in

section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired before 1976.

**(3) 1974 UMWA Pension Plan.**—The term "1974 UMWA Pension Plan" means a pension plan described in section 404(c) (or a continuation thereof), participation in which is substantially limited to individuals who retired in 1976 and thereafter.

**(4) 1992 UMWA Benefit Plan.**—The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

**(5) Combined Fund.**—The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

**(b) Agreements.**—For purposes of this section—

**(1) Coal wage agreement.**—The term "coal wage agreement" means—

**(A)** the National Bituminous Coal Wage Agreement, or

**(B)** any other agreement entered into between an employer in the coal industry and the United Mine Workers of America that required or requires one or both of the following:

**(i)** the provision of health benefits to retirees of such employer, eligibility for which is

based on years of service credited under a plan established by the settlors and described in section 404(c) or a continuation of such plan; or

(ii) contributions to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or any predecessor thereof.

**(2) Settlors.**—The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

**(3) National Bituminous Coal Wage Agreement.**—The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

**(c) Terms relating to operators.**—For purposes of this section—

**(1) Signatory operator.**—The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

**(2) Related persons.**—

**(A) In general.**—A person shall be considered to be a related person to a signatory operator if that person is—

(i) a member of the controlled group of corporations (within the meaning of section

52(a)) which includes such signatory operator;

**(ii)** a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

**(iii)** any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

**(B) Time for determination.**—The relationships described in clauses (i), (ii), and (iii) of subparagraph (A) shall be determined as of July 20, 1992 except that if, on July 20, 1992, a signatory operator is no longer in business, the relationships shall be determined as of the time immediately before such operator ceased to be in business.

**(3) 1988 agreement operator.**—The term "1988 agreement operator" means—.

**(A)** a signatory operator which was a signatory to the 1988 National Bituminous Coal Wage Agreement.

**(B)** an employer in the coal industry which was a

signatory to an agreement containing pension and health care contribution and benefit provisions which are the same as those contained in the 1988 National Bituminous Coal Wage Agreement, or

(C) an employer from which contributions were actually received after 1987 and before July 20, 1992, by the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan in connection with employment in the coal industry during the period covered by the 1988 National Bituminous Coal Wage Agreement.

**(4) Last signatory operator.**—The term "last signatory operator" means, with respect to a coal industry retiree, a signatory operator which was the most recent coal industry employer of such retiree.

**(5) Assigned operator.**—The term "assigned operator" means, with respect to an eligible beneficiary defined in section 9703(f), the signatory operator to which liability under subchapter B with respect to the beneficiary is assigned under section 9706.

**(6) Operators of dependent beneficiaries.**—For purposes of this chapter, the signatory operator, last signatory operator, or assigned operator of any eligible beneficiary under this chapter who is a coal industry retiree shall be considered to be the signatory operator, last signatory operator, or assigned operator with respect to any other individual who is an eligible beneficiary under this chapter by reason of a relationship to the retiree.

**(7) Business.**—For purposes of this chapter, a person

shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry.

**(d) Enactment date.**—For purposes of this chapter, the term "enactment date" means the date of the enactment of this chapter.

**§ 9702. Establishment of the United Mine Workers of America Combined Benefit Fund**

**(a) Establishment.—**

**(1) In general.**—As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

**(2) Merger of retiree benefit plans.**—As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

**(3) Treatment of plan.**—The Combined Fund shall be—

**(A)** a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37))

(4) **Tax treatment.**—For purposes of this title, the Combined Fund and any related trust shall be treated as an organization exempt from tax under section 501(a).

(b) **Board of trustees.**—

(1) **In general.**—For purposes of subsection (a), the board of trustees for the Combined Fund shall be appointed as follows:

(A) one individual who represents employers in the coal mining industry shall be designated by the BCOA;

(B) one individual shall be designated by three employers, other than 1988 agreement operators, who have been assigned the greatest number of eligible beneficiaries under section 9706;

(C) two individuals designated by the United Mine Workers of America; and

(D) three persons selected by the persons appointed under subparagraphs (A), (B), and (C)

**(2) Successor trustees.**—Any successor trustee shall be appointed in the same manner as the trustee being succeeded. The plan establishing the Combined Fund shall provide for the removal of trustees

**(3) Special rules.—**

**(A) BCOA.**—If the BCOA ceases to exist any trustee or successor under paragraph (1)(A) shall be designated by the 3 employers who were members of the BCOA on the enactment date and who have been assigned the greatest number of eligible beneficiaries under section 9706.

**(B) Former signatories.**—The initial trustee under paragraph (1)(B) shall be designated by 3 employers, other than 1988 agreement operators, which the records of the 1950 UMWA Benefit Plan and 1974 UMWA Benefit Plan indicate have the greatest number of eligible beneficiaries as of the enactment date, and such trustee and any successor shall serve until November 1, 1993.

**(c) Plan year.**—The first plan year of the Combined Fund shall begin February 1, 1993, and end September 30, 1993. Each succeeding plan year shall begin on October 1 of each calendar year.

(Added Pub.L. 102-486, Title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3040.)

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**§ 9703. Plan benefits**

**(a) In general.**—Each eligible beneficiary of the Combined Fund shall receive —

**(1)** health benefits described in subsection (b) and

**(2)** in the case of an eligible beneficiary described in subsection (f)(1), death benefits coverage described in subsection (c).

**(b) Health benefits.—**

**(1) In general.**—The trustees of the Combined Fund shall provide health care benefits to each eligible beneficiaries by enrolling the beneficiary in a health care services plan which undertakes to provide such benefits on a prepaid risk basis. The trustees shall utilize all available plan resources to ensure that, consistent with paragraph (2), coverage under the managed care system shall to the maximum extent feasible be substantially the same as (and subject to the same limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

**(2) Plan payment rates.—**

**(A) In general.**—The trustees of the Combined Fund shall negotiate payment rates with the health care services plans described in paragraph (1) for each plan year which are in amounts which—

**(i)** vary as necessary to ensure that

beneficiaries in different geographic areas have access to a uniform level of health benefits; and

(ii) result in aggregate payments for such plan year from the Combined Fund which do not exceed the total premium payments required to be paid to the Combined Fund under section 9704(a) for the plan year, adjusted as provided in subparagraphs (B) and (C).

**(B) Reductions.**—The amount determined under subparagraph (A)(ii) for any plan year shall be reduced—

(i) by the aggregate death benefit premiums determined under section 9704(c) for the plan year, and

(ii) by the amount reserved for plan administration under subsection (d).

**(C) Increases.**—The amount determined under subparagraph (A)(ii) shall be increased—

(i) by any reduction in the total premium payments required to be paid under section 9704(a) by reason of transfers described in section 9705,

(ii) by any carry over to the plan year from any preceding plan year which—

(I) is derived from amounts described in section 9704(e)(3)(B)(i), and

(II) the trustees elect to use to pay benefits for the current plan year, and

(iii) any interest earned by the Combined Fund which the trustees elect to use to pay benefits for the current plan year.

**(3) Qualified providers.**—The trustees of the Combined Fund shall not enter into an agreement under paragraph (1) with any provider of services which is of a type which is required to be certified by the Secretary of Health and Human Services when providing services under title XVIII of the Social Security Act unless the provider is so certified.

**(4) Effective date.**—Benefits shall be provided under paragraph (1) on and after February 1, 1993.

**(c) Death benefits coverage.—**

**(1) In general.**—The trustees of the Combined Fund shall provide death benefits coverage to each eligible beneficiary described in subsection (f)(1) which is identical to the benefits provided under the 1950 UMWA Pension Plan or 1974 UMWA Pension Plan, whichever is applicable, on July 20, 1992. Such coverage shall be provided on and after February 1, 1993.

**(2) Termination of coverage.**—The 1950 UMWA Pension Plan and the 1974 UMWA Pension Plan shall each be amended to provide that death benefits coverage shall not be provided to eligible beneficiaries on and after February 1, 1993. This paragraph shall not prohibit such

plans from subsequently providing death benefits not described in paragraph (1).

**(d) Reserves for administration.**—The trustees of the Combined Fund may reserve for each plan year, for use in payment of the administrative costs of the Combined Fund, an amount not to exceed 5 percent of the premiums to be paid to the Combined Fund under section 9704(a) during the plan year.

**(e) Limitation on enrollment.**—The Combined Fund shall not enroll any individual who is not receiving benefits under the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of July 20, 1992.

**(f) Eligible beneficiary.**—For purposes of this subchapter, the term "eligible beneficiary" means an individual who—

**(1)** is a coal industry retiree who, on July 20, 1992, was eligible to receive, and receiving, benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, or

**(2)** on such date was eligible to receive, and receiving, benefits in either such plan by reason of a relationship to such retiree.

(Added Pub.L. 102-486, Title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3041.)

**§ 9704. Liability of assigned operators**

**(a) Annual premiums.**—Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums—

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

**(b) Health benefit premium.**—For purposes of this chapter—

**(1) In general.**—The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

**(2) Per beneficiary premium.**—The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of—

**(A)** the amount determined by dividing—

**(i)** the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative

costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

**(B)** the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

**(3) Adjustments for medicare reductions.**—If, by reason of a reduction in benefits under title XVIII of the Social Security Act, the level of health benefits under the Combined Fund would be reduced, the trustees of the Combined Fund shall increase the per beneficiary premium for the plan year in which the reduction occurs and each subsequent plan year by the amount necessary to maintain the level of health benefits which would have been provided without such reduction.

**(c) Death benefit premium.**—The death benefit premium for any plan year for any assigned operator shall be equal to the applicable percentage of the amount, actuarially determined, which the Combined Fund will be required to pay during the plan year for death benefits coverage described in section 9703(c).

**(d) Unassigned beneficiaries premium.**—The unassigned beneficiaries premium for any plan year for any assigned operator shall be equal to the applicable percentage of the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries who are not assigned under section 9706 to any person for such plan year.

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**(e) Premium accounts; adjustments.—**

**(1) Accounts.**—The trustees of the Combined Fund shall establish and maintain 3 separate accounts for each of the premiums described in subsections (b), (c), and (d). Such accounts shall be credited with the premiums received and debited with expenditures allocable to such premiums.

**(2) Allocations.—**

**(A) Administrative expenses.**—Administrative costs for any plan year shall be allocated to premium accounts under paragraph (1) on the basis of expenditures (other than administrative costs) from such accounts during the preceding plan year.

**(B) Interest.**—Interest shall be allocated to the account established for health benefit premiums.

**(3) Shortfalls and surpluses.—**

**(A) In general.**—Except as provided in subparagraph (B), if, for any plan year, there is a shortfall or surplus in any premium account, the premium for the following plan year for each assigned operator shall be proportionately reduced or increased, whichever is applicable, by the amount of such shortfall or surplus.

**(B) Exception.**—Subparagraph (A) shall not apply to any surplus in the health benefit premium account or the unassigned beneficiaries premium account which is attributable to—

(i) the excess of the premiums credited to such account for a plan year over the benefits, (and administrative costs) debited to such account for the plan year, but such excess shall only be available for purposes of the carryover described in section 9703(b)(2)(C)(ii) (relating to carryovers of premiums not used to provide benefits), or

(ii) interest credited under paragraph (2)(B) for the plan year or any preceding plan year.

**(C) No authority for increased payments.**—Nothing in this paragraph shall be construed to allow expenditures for health care benefits for any plan year in excess of the limit under section 9703(b)(2).

**(f) Applicable percentage.**—For purposes of this section—

**(1) In general.**—The term "applicable percentage" means, with respect to any assigned operator, the percentage determined by dividing the number of eligible beneficiaries assigned under section 9706 to such operator by the total number of eligible beneficiaries assigned under section 9706 to all such operators (determined on the basis of assignments as of October 1, 1993).

**(2) Annual adjustments.**—In the case of any plan year beginning on or after October 1, 1994, the applicable percentage for any assigned operator shall be redetermined under paragraph (1) by making the following changes to the assignments as of October 1, 1993:

**(A)** Such assignments shall be modified to reflect any changes during the period beginning October 1, 1993, and ending on the last day of the preceding plan year pursuant to the appeals process under section 9706(f).

**(B)** The total number of assigned eligible beneficiaries shall be reduced by the eligible beneficiaries of assigned operators which (and all related persons with respect to which) had ceased business (within the meaning of section 9701(c)(6)) during the period described in subparagraph (A).

**(g) Payment of premiums.—**

**(1) In general.**—The annual premium under subsection (a) for any plan year shall be payable in 12 equal monthly installments, due on the twenty-fifth day of each calendar month in the plan year. In the case of the plan year beginning February 1, 1993, the annual premium under subsection (a) shall be added to such premium for the plan year beginning October 1, 1993.

**(2) Deductibility.**—Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

**(h) Information.**—The trustees of the Combined Fund shall, not later than 60 days after the enactment date, furnish to the Commissioner of Social Security information as to the benefits and covered beneficiaries under the fund, and such other information as the Secretary may required to compute any premium under this section.

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**(i) Transition rules.—**

**(1) 1988 agreement operators.—**

**(A) 1st year costs.**—During the plan year of the Combined Fund beginning February 1, 1993, the 1988 agreement operators shall make contributions to the Combined Fund in amounts necessary to pay benefits and administrative costs of the Combined Fund incurred during such year, reduced by the amount transferred to the Combined Fund under section 9705(a) on February 1, 1993.

**(B) Deficits from merged plans.**—During the period beginning February 1, 1993, and ending September 30, 1994, the 1988 agreement operators shall make contributions to the Combined Fund as are necessary to pay off the expenses accrued (and remaining unpaid) by the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, reduced by the assets of such plans as of such date.

**(C) Failure.**—If any 1988 agreement operator fails to meet any obligation under this paragraph, any contributions of such operator to the Combined Fund or any other plan described in section 404(c) shall not be deductible under this title until such time as the failure is corrected.

**(D) Premium reductions.—**

**(i) 1st year payments.**—In the case of a

1988 agreement operator making contributions under subparagraph (A), the premium of such operator under subsection (a) shall be reduced by the amount paid under subparagraph (A) by such operator for the plan year beginning February 1, 1993.

**(ii) Deficit payments.**—In the case a 1988 agreement operator making contributions under subparagraph (B), the premium of such operator under subsection (a) shall be reduced by the amounts which are paid to the Combined Fund by reason of claims arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims based on the "evergreen clause" found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan, and which are allocated to such operator under subparagraph (E).

**(iii) Limitation.**—Clause (ii) shall not apply to the extent the amounts paid exceed the contributions.

**(iv) Plan years.**—Premiums under subsection (a) shall be reduced for the first plan year for which amounts described in clause (i) or (ii) are available and for any succeeding plan year until such amounts are exhausted.

**(E) Allocations of contributions and refunds.**— Contributions under subparagraphs (A)

and (B), and premium reductions under subparagraph (D)(ii), shall be made ratably on the basis of aggregate contributions made by such operators under the applicable 1988 coal wage agreements as of January 31, 1993.

**(2) 1st plan year.**—In the case of the plan year of the Combined Fund beginning February 1, 1993—

**(A)** the premiums under subsections (a)(1) and (a)(3) shall be 67 percent of such premiums without regard to this paragraph, and

**(B)** the premiums under subsection (a) shall be paid as provided in subsection (g).

**(3) Startup costs.**—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall pay the costs of the Combined Fund incurred before February 1, 1993. For purposes of this section, such costs shall be treated as administrative expenses incurred for the plan year beginning February 1, 1993.

(Added Pub.L. 102-486, Title XIX. § 19143(a), Oct. 24, 1992, 106 Stat. 3042, and amended Pub.L. 103-296, Title I, § 108(h)(9)(A), Aug. 15, 1994, 108 Stat. 1487.)

**§ 9705. Transfers**

**(a) Transfer of assets from 1950 UMWA Pension Plan.—**

**(1) In general.**—From the funds reserved under paragraph (2), the board of trustees of the 1950 UMWA Pension Plan shall transfer to the Combined Fund—

**(A)** $70,000,000 on February 1, 1993.

**(B)** $70,000,000 on October 1, 1993, and

**(C)** $70,000,000 on October 1, 1994.

**(2) Reservation.**— Immediately upon the enactment date, the board of trustees of the 1950 UMWA Pension Plan shall segregate $210,000,000 from the general assets of the plan. Such funds shall be held in the plan until disbursed pursuant to paragraph (1). Any interest on such funds shall be deposited into the general assets of the 1950 UMWA Pension Plan.

**(3) Use of funds.**—Amounts transferred to the Combined Fund under paragraph (1) shall—

**(A)** in the case of the transfer on February 1, 1993, be used to proportionately reduce the premium of each assigned operator under section 9704(a) for the plan year of the Fund beginning February 1, 1993, and

**(B)** in the case of any other such transfer be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) and the death benefit premium under section 9704(a)(2) of each assigned operator for the plan year in which transferred and for any subsequent plan year in which such funds remain available.

Such funds may not be used to pay any amounts required to be paid by the 1988 agreement operators, under section 9704(i)(1)(B).

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**(4) Tax treatment; validity of transfer.—**

**(A) No deduction.**—No deduction shall be allowed under this title with respect to any transfer pursuant to paragraph (1), but such transfer shall not adversely affect the deductibility (under applicable provisions of this title) of contributions previously made by employers, or amounts hereafter contributed by employers, to the 1950 UMWA Pension Plan, the 1950 UMWA Benefit Plan, the 1974 UMWA Pension Plan, the 1974 UMWA Benefit Plan, the 1992 UMWA Benefit Plan, or the Combined Fund.

**(B) Other tax provisions.**—Any transfer pursuant to paragraph (1)—

(i) shall not be treated as an employer reversion from a qualified plan for purposes of Section 4980, and

(ii) shall not be includible in the gross income of any employer maintaining the 1950 UMWA Pension Plan.

**(5) Treatment of transfer.**—Any transfer pursuant to paragraph (1) shall not be deemed to violate, or to be prohibited by, any provision of law, or to cause the settlors, joint board of trustees, employers or any related person to incur or be subject to liability taxes, fines, or penalties of any kind whatsoever.

**(b) Transfers from abandoned mine reclamation fund.—**

**(1) In general.**—The Combined Fund shall include any amount transferred to the Fund under section 402(h) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1232(h)).

**(2) Use of funds.**—Any amount transferred under paragraph (1) for any fiscal year shall be used to proportionately reduce the unassigned beneficiary premium under section 9704(a)(3) of each assigned operator for the plan year in which transferred.

(Added Pub.L. 102-486, Title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3046.)

**§ 9706. Assignment of eligible beneficiaries**

**(a) In general.**—For purposes of this chapter, the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

**(1)** First, to the signatory operator which—

**(A)** was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

**(B)** was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

**(b) Rules relating to employment and reassignment upon purchase.**—For purposes of subsection (a)—

**(1) Aggregation rules.—**

**(A) Related person.**—Any employment of a coal industry retiree in the coal industry by a signatory operator shall be treated as employment by any related persons to such operator.

**(B) Certain employment disregarded.**—Employment with—

(i) a person which is (and all related persons with respect to which are) no longer in business, or

(ii) a person during a period during which such person was not a signatory to a coal wage agreement, shall not be taken into account.

**(2) Reassignment upon purchase.**—If a person becomes a successor of an assigned operator after the enactment date, the assigned operator may transfer the assignment of an eligible beneficiary under subsection (a) to such successor, and such successor shall be treated as the assigned operator with respect to such eligible beneficiary for purposes of this chapter. Notwithstanding the preceding sentence, the assigned operator transferring such assignment (and any related person) shall remain the guarantor of the benefits provided to the eligible beneficiary under this chapter. An assigned operator shall notify the trustees of the Combined Fund of any transfer described in this paragraph.

**(c) Identification of eligible beneficiaries.**—The 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall, by the later of October 1, 1992, or the twentieth day after the enactment date, provide to the Commissioner of Social Security a list of the names and social security account numbers of each eligible beneficiary, including each deceased eligible beneficiary if any other individual is an eligible beneficiary by reason of a relationship to such deceased eligible beneficiary. In addition, the plans shall provide, where ascertainable from plan records, the names of all persons described in subsection (a) with respect to any eligible beneficiary or deceased eligible beneficiary.

**(d) Cooperation by other agencies and persons.—**

**(1) Cooperation.**—The head of any department,

agency, or instrumentality of the United States shall cooperate fully and promptly with the Commissioner of Social Security in providing information which will enable the Commissioner to carry out his responsibilities under this section.

**(2) Providing of information.—**

**(A) In general.**—Notwithstanding any other provision of law, including section 6103, the head of any other agency, department, or instrumentality shall, upon receiving a written request from the Commissioner of Social Security in connection with this section, cause a search to be made of the files and records maintained by such agency, department, or instrumentality with a view to determining whether the information requested is contained in such files or records. The Commissioner shall be advised whether the search disclosed the information requested, and, if so, such information shall be promptly transmitted to the Commissioner, except that if the disclosure of any requested information would controvene national policy or security interests of the United States, or the confidentiality of census data, the information shall not be transmitted and the Commissioner shall be so advised.

**(B) Limitation.**—Any information provided under subparagraph (A) shall be limited to information necessary for the Commissioner to carry out his duties under this section.

**(3) Trustees.**—The trustees of the Combined Fund,

the 1950 UMWA Benefit Plan, the 1974 UMWA Benefit Plan, the 1950 UMWA Pension Plan, and the 1974 UMWA Pension Plan shall fully and promptly cooperate with the Commissioner in furnishing, or assisting the Commissioner to obtain, any information the Commissioner needs to carry out the Commissioner's responsibilities under this section.

(e) Notice by Commissioner.—

(1) **Notice to Fund.**—The Commissioner of Social Security shall advise the trustees of the Combined Fund of the name of each person identified under this section as an assigned operator, and the names and social security account numbers of eligible beneficiaries with respect to whom he is identified.

(2) **Other notice.**—The Commissioner of Social Security shall notify each assigned operator of the names and social security account numbers of eligible beneficiaries who have been assigned to such person under this section and a brief summary of the facts related to the basis for such assignments.

**(f) Reconsideration by Commissioner.—**

(1) **In general.**—Any assigned operator receiving a notice under subsection (e)(2) with respect to an eligible beneficiary may, within 30 days of receipt of such notice, request from the Commissioner of Social Security detailed information as to the work history of the beneficiary and the basis of the assignment.

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**(2) Review.**—An assigned operator may, within 30 days of receipt of the information under paragraph (1), request review of the assignment. The Commissioner of Social Security shall conduct such review if the Commissioner finds the operator provided evidence with the request constituting a prima facie case of error.

**(3) Results of review.**—

**(A) Error.**—If the Commissioner of Social Security determines under a review under paragraph (2) that an assignment was in error—

**(i)** the Commissioner shall notify the assigned operator and the trustees of the Combined Fund and the trustees shall reduce the premiums of the operator under section 9704 by (or if there are no such premiums, repay) all premiums paid under section 9704 with respect to the eligible beneficiary, and

**(ii)** the Commissioner shall review the beneficiary's record for reassignment under subsection (a).

**(B) No error.**—If the Commissioner of Social Security determines under a review conducted under paragraph (2) that no error occurred, the Commissioner shall notify the assigned operator.

**(4) Determinations.**—Any determination by the Commissioner of Social Security under paragraph (2) or (3) shall be final.

**(5) Payment pending review.**—An assigned operator shall pay the premiums under section 9704 pending review by the Commissioner of Social Security or by a court under this subsection.

**(6) Private actions.**—Nothing in this section shall preclude the right of any person to bring a separate civil action against another person for responsibility for assigned premiums, notwithstanding any prior decision by the Commissioner.

**(g) Confidentiality of information.**—Any person to which information is provided by the Commissioner of Social Security under this section shall not disclose such information except in any proceedings related to this section. Any civil or criminal penalty which is applicable to an unauthorized disclosure under section 6103 shall apply to any unauthorized disclosure under this section.

(Added Pub.L. 102-486, Title XIX, § 19143(a). Oct. 24, 1992, 106 Stat. 3047, and amended Pub.L. 103-296, Title I, § 108(h)(9)(B), Aug. 15, 1994, 108 Stat. 1487.)

**§ 9707. Failure to pay premium**

**(a) General rule.**—There is hereby imposed a penalty on the failure of any assigned operator to pay any premium required to be paid under section 9704 with respect to any eligible beneficiary.

**(b) Amount of penalty.**—The amount of the penalty imposed by subsection (a) on any failure with respect to any eligible beneficiary shall be $100 per day in the noncompliance period with respect to any such failure.

**(c) Noncompliance period.**—For purposes of this section, the term "noncompliance period" means, with respect to any failure to pay any premium or installment thereof, the period—

**(1)** beginning on the due date for such premium or installment, and

**(2)** ending on the date of payment of such premium or installment.

**(d) Limitations on amount of penalty.—**

**(1) In general.**—No penalty shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary of the Treasury that none of the persons responsible for such failure knew, or exercising reasonable diligence, would have known, that such failure existed.

**(2) Corrections.**—No penalty shall be imposed by subsection (a) on any failure if—

**(A)** such failure was due to reasonable cause and not to willful neglect, and

**(B)** such failure is corrected during the 30-day period beginning on the 1st date that any of the persons responsible for such failure knew, or exercising reasonable diligence would have known, that such failure existed.

**(3) Waiver.**—In the case of a failure that is due to reasonable cause and not to willful neglect, the Secretary of the Treasury may waive all or part of the penalty imposed by

subsection (a) for failures to the extent that the Secretary determines, in his sole discretion, that the payment of such penalty would be excessive relative to the failure involved.

**(e) Liability for penalty.**—The person failing to meet the requirements of section 9704 shall be liable for the penalty imposed by subsection (a).

**(f) Treatment.**—For purposes of this title, the penalty imposed by this section shall be treated in the same manner as the tax imposed by section 4980B.

(Added Pub.L. 102-486, Title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3050.)

**§ 9708. Effect on pending claims or obligations**

All liability for contributions to the Combined Fund that arises on and after February 1, 1993, shall be determined exclusively under this chapter, including all liability for contributions to the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for coal production on and after February 1, 1993. However, nothing in this chapter is intended to have any effect on any claims or obligations arising in connection with the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of February 1, 1993, including claims or obligations based on the "evergreen" clause found in the language of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan. This chapter shall not be construed to affect any rights of subrogation of any 1988 agreement operator with respect to contributions due to the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan as of February 1, 1993.

(Added Pub.L. 102-486, Title XIX, § 19143(a), Oct. 24, 1992, 106 Stat. 3051.)

Supreme Court, U.S.
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No. 96-431

# In the Supreme Court of the United States

OCTOBER TERM, 1996

BLUE DIAMOND COAL COMPANY,
*Petitioner,*
v.
SHIRLEY S. CHATER, *et al.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF FOR RESPONDENT TRUSTEES OF THE UMWA COMBINED BENEFIT FUND IN OPPOSITION

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## QUESTION PRESENTED

In the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), 26 U.S.C. §§ 9701 *et seq.*, Congress determined that each employer that voluntarily participated in the collectively bargained multiemployer health care system for active and retired miners in the coal industry and whose former employees were still receiving benefits from that system, should, beginning on February 1, 1993, pay the future health care costs of the retired employees and dependents assigned to that employer by the Secretary of Health and Human Services under the criteria set forth in the statute.

The question presented is whether the Coal Act, as applied to petitioner, violates the Takings Clause of the Fifth Amendment.

## LIST OF PARTIES

The caption of the petition lists all of the parties to the case.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 79 F.3d 516. The opinion of the district court (Pet. App. 23a-37a) is reported at 174 B.R. 722.

### STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"), which was enacted as part of the Energy Policy Act of 1992, Pub. L. No. 102-456, 106 Stat. 2776, 3036-3056. The Coal Act added a new Subtitle J, "Coal Industry Health Benefits," to the Internal Revenue Code. Subtitle J is codified at 26 U.S.C. §§ 9701-9722. The statute

also amended the Surface Mining Control and Reclamation Act of 1977 (the "Surface Mining Act"). Those amendments are codified in principal part in 30 U.S.C. § 1232(h). The congressional "Findings and Declaration of Policy," which appear at the beginning of the Coal Act, and 26 U.S.C. §§ 9701-9708 are reproduced in Appendix D to the petition, Pet. App. 39a-70a.

## STATEMENT OF THE CASE

Petitioner presents a misleading and distorted account of the origins of the Coal Act, the problem that Congress sought to address, the nature of the legislative solution, and the rationale for the congressional action. Petitioner bases its entire argument on one ground—that it never made an express promise of lifetime benefits to its miners. As both the district court and the court of appeals held, however, this argument is unavailing. First, as the district court explained, "the actual Congressional finding which is mentioned in the legislation is not that Blue Diamond and others like it had actually *promised* benefits but that they bore 'responsibility' for the 'plan liabilities.' There is no doubt that, to some extent, they did." Pet. App. 30a (emphasis in original). Moreover, as the court of appeals ruled "[t]he fact that Blue Diamond never explicitly promised its employees lifetime benefits and never signed an NBCWA that contained an explicit promise of lifetime benefits is not dispositive, because Congress's power to regulate is not limited by the terms of private contracts." Pet. App. 14a.

To put the Coal Act and the present dispute in its proper context, we first review the nearly 50-year history of the UMWA Health & Retirement Funds, petitioner's substantial participation in those Funds, and the financial crisis that afflicted the Funds as petitioner and more and more employers like it discontinued their participation and left their former employees behind, either to receive no retiree health care at all or to obtain such care financed

by other employers. We then turn to the Coal Act itself and its legislative history, explaining the provisions of the statute, the reasons for the congressional intervention, and the basis for Congress's conclusion that the problem could not be solved through private collective bargaining. Finally, we summarize the decisions below and the grounds on which petitioner's constitutional challenges were rejected.

### A. The UMWA Multiemployer Health and Retirement Funds

For more than forty years, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multiemployer bargaining association representing various companies in the coal industry, have entered into a series of collective bargaining agreements known as National Bituminous Coal Wage Agreements ("NBCWAs"). Each NBCWA required signatory coal operators to pay contributions to finance health benefits for both active and retired miners and their dependents through multiemployer benefit plans. The origin of these plans was an historic agreement between the federal government and the UMWA.

#### 1. *Establishment of the UMWA Multiemployer Health Care System*

The first coal industry multiemployer benefit plan was created in an agreement between the UMWA and the United States, in settlement of a national strike during which the federal government seized virtually all of the nation's coal mines. The dispute began when, during collective bargaining negotiations between the UMWA and the bituminous coal operators, the UMWA proposed that the parties create a health and welfare fund for its members. The employers rejected the proposal, and a strike ensued. In an effort to end the strike and avoid further disruption in the coal industry and elsewhere in the econ-

omy, President Truman issued Executive Order No. 9728 on May 21, 1946, directing Secretary of the Interior Julius Krug to seize the mines. The order also authorized Secretary Krug to negotiate with the UMWA for changes in the miners' terms and conditions of employment.

Those negotiations culminated in what is known as the Krug-Lewis Agreement. The Krug-Lewis Agreement created a multiemployer benefit plan called the United Mine Workers of America Welfare and Retirement Fund (the "1946 W&R Fund"). The 1946 W&R Fund was intended to provide various health and retirement benefits to UMWA miners and their dependents and survivors. In addition, under the Krug-Lewis Agreement, the federal government committed to conduct a comprehensive study of medical facilities and medical care in the nation's coal mining areas. At the request of Secretary Krug, that survey was conducted, and a report prepared, by Rear Admiral Joel T. Boone of the United States Navy Medical Corps.

In 1947, the UMWA and coal operators created a new multiemployer benefit plan known as the 1947 UMWA Welfare and Retirement Fund (the "1947 W&R Fund"), which succeeded to the assets and liabilities of the 1946 W&R Fund. Like its predecessor, the 1947 W&R Fund was created to make payments to UMWA miners and their dependents for a broad range of health and retirement benefits. By the end of December 1948, the 1947 W&R Fund had provided medical benefits and pensions to more than 250,000 coal miners and their families in 26 states.

In 1950, the UMWA and coal operators created a new multiemployer fund called the United Mine Workers of America Welfare and Retirement Fund of 1950 (the "1950 W&R Fund"). The 1950 W&R Fund succeeded to the assets and liabilities of the 1947 W&R Fund. Like the 1946 W&R Fund and the 1947 W&R Fund, the 1950

W&R Fund was intended to provide pension and health benefits to UMWA miners and their dependents.[1]

In July 1950, building upon the 1947 W&R Fund's medical program, the 1950 W&R Fund introduced a comprehensive hospital and medical care program. The program included the payment of unlimited hospitalization and in-hospital medical care for the following classes of beneficiaries: working and unemployed miners; working and unemployed miners' wives and dependent children under age 18; retired miners and their wives; widows of deceased miners; and relatives of deceased miners who cared for the miners' orphaned children. The program's hospital and medical care coverage for miners' widows terminated only upon their remarriage.

During the 28 years of their existence, from 1946 to 1974, the 1950 W&R Fund and its predecessors provided comprehensive health care coverage to UMWA active and retired miners and their families. As such, the Funds had a significant impact on the economies of the bituminous coal producing states and the UMWA mining families that lived in those states. During this period, the 1950 W&R Fund and its predecessors collected approximately $3.9 billion in contributions from signatory coal operators, and paid approximately $1.5 billion in hospital and medical care benefits, $283 million in survivors and other

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[1] Employer contributions to the 1950 W&R Fund were not tax deductible until 1954, when Congress amended the Internal Revenue Code. Congress wrote the amendment in such a way that it effectively applied only to the 1950 W&R Fund. *See* 26 U.S.C. § 404(c). In recommending the amendment, the Senate Finance Committee emphasized that the fund was "established during a period of Government operation" and was "the result of an agreement between employee representatives and the United States Government during a period of Government seizure and operation of most of the facilities of the industry." S. Rep. No. 1622, 83d Cong., 2d Sess. 56 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4623, 4687. *See also* H.R. Rep. No. 2543, 83d Cong., 2d Sess. 43 (1954), *reprinted in* 1954 U.S.C.C.A.N. 5280, 5303.

related benefits, and approximately $2 billion in pension benefits.[2]

### 2. *The Establishment of the UMWA 1950 and 1974 Benefit Trusts*

The 1950 W&R Fund continued to provide health benefits through the term of the 1971 NBCWA, which ended in 1974. Under the 1974 NBCWA, however, partly in response to the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), BCOA and the UMWA agreed to divide the 1950 W&R Fund into four separate multiemployer plans.[3] Two of the four new plans provided pension benefits to retired miners. The other two plans provided health benefits to retired miners. One of the health benefit plans, known as the United Mine Workers of America 1950 Benefit Plan and Trust (the "1950 Benefit Trust"), provided health benefits to UMWA miners who retired before

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[2] Over the years, the 1950 W&R Fund from time to time increased, decreased, or suspended certain benefits. For example, on January 15, 1954, the 1950 W&R Fund limited the duration of hospital and medical coverage for widows, dependent children, and orphans of deceased miners to the twelve-month period during which a survivors benefit was paid on their behalf. On April 11, 1960, the 1950 W&R Fund imposed hospital and medical care eligibility restrictions for unemployed miners and miners disabled as a result of work-related injuries. On January 19, 1967, the eligibility for widows and dependent survivors of both working and retired miners was partially restored. Finally, on November 13, 1973, the 1950 W&R Fund restored the eligibility for hospital and medical care benefits for widows of miners killed in mine accidents and miners disabled as a result of work-related injuries. As had been the case before such eligibility was first limited in 1954, these beneficiaries' eligibility for hospital and medical benefits was restored for their lives or, in the case of surviving spouses, until they remarried.

[3] In 1974, Congress again enacted special provisions in the Internal Revenue Code to alleviate potential tax burdens that otherwise would have accompanied the restructuring of the 1950 W&R Fund. The rationale supporting these special provisions was the same as the one that supported the original enactment of Section 404(c) of the Internal Revenue Code twenty years earlier.

1976. The second plan, known as the United Mine Workers of America 1974 Benefit Plan and Trust (the "1974 Benefit Trust"), provided health benefits for miners who retired in 1976 or thereafter as well as for the active work force.[4]

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. The 1978 NBCWA continued the multiemployer approach for providing health benefits to persons who retired before January 1, 1976, but it provided that persons who retired on or after that date would receive their health benefits from single-employer plans maintained by the retirees' "last NBCWA signatory employer." The 1974 Benefit Trust was retained to provide health benefits on a multiemployer basis to those persons who retired on or after January 1, 1976 and whose last signatory employers were no longer in business (the so-called "orphan" retirees).

### B. The Crisis That Threatened The UMWA Trusts' Beneficiaries And The Efforts To Resolve It

During the past decade, the problems that led to the 1978 restructuring of the collectively bargained multiemployer health care system became more acute and threatened the 1950 and 1974 Benefit Trusts' ability to continue providing health benefits to their beneficiaries. The uncertainty of continued health benefits for active and retired UMWA miners led to substantial labor strife in the

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[4] The UMWA multiemployer health and medical benefit plans, *i.e.*, the 1946 W&R Fund, 1947 W&R Fund, 1950 W&R Fund, and the 1950 and 1974 Benefit Trusts are collectively referred to herein as the "UMWA Trusts."

nation's bituminous coal mining regions and threatened the economies of several coal producing states.[5]

One of the most serious of these labor disputes was a ten-month strike by the UMWA against the Pittston Coal Company and its related entities. When collective bargaining failed to resolve the dispute, Secretary of Labor Elizabeth Dole intervened and appointed former Secretary of Labor William J. Usery as mediator. As part of the eventual settlement of the dispute, Secretary Dole established a special advisory commission called the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"). The Secretary authorized the Coal Commission to analyze the retiree health care crisis and recommend a solution. Former Secretary Usery was appointed Chair of the Coal Commission.

In November 1990, the Coal Commission submitted its findings and recommendations to Secretary Dole in a report entitled "Coal Commission Report: A Report to the Secretary of Labor and the American People."[6] In analyzing the health care crisis in the coal industry, the Coal Commission stated that ensuring the continued provision of health benefits to UMWA retirees and their dependents should be the primary objective of any proposed solution:

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[5] *See, e.g.*, 136 Cong. Rec. S12312 (statement of Senator Rockefeller) (daily ed. Oct. 2, 1989) ("the [UMWA health] funds contribute many millions of dollars to the West Virginia economy and sustain the efforts of many health care practitioners and organizations. If allowed to continue unchecked, the financial difficulties in the UMWA health funds could cripple health care delivery in West Virginia and in coal counties of states like Alabama, Arkansas, Colorado, Illinois, Indiana, Kentucky, Ohio, Pennsylvania, and Virginia").

[6] A copy of the Coal Commission Report was lodged with the Clerk of this Court when the respondent Trustees filed their brief in opposition to the petitions in Nos. 95-1709 and 95-1751 (*Davon* and *Templeton*), which were denied on October 7, 1996. The Report has been retained in the Clerk's correspondence file in No. 95-1709.

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they received during their working lives and that is how they planned their retirement years. That commitment should be honored. But today those expectations and commitments are in jeopardy.

Coal Commission Report at 1. Recognizing the historical origins of the UMWA Trusts, the Coal Commission observed:

> The medical care delivery system that has evolved is as much a creature of government as it is of the collective bargaining process. There is a line running from the original Boone Report to the present system. In a way, the original Krug-Lewis agreement predisposed if not predetermined the system that evolved.

*Id.* at 29. The Coal Commission identified three developments, the combination of which "has left the Funds, which were created to provide retired coal miners and their families with one of the finest health care programs in the nation, in a financial crisis." *Id.* at 2.

First, the Coal Commission found that "the number of coal companies making contributions to the Funds has declined significantly." Coal Commission Report at 2.[7] Second, it recognized the dramatic increase in the cost of health care between 1950 and 1990, stating that "[i]n the past 10 years alone, the total cost of [annual] health care benefits paid by the Funds has doubled from $117.4 million to $245.3 million." *Id.* Finally, the Coal Commission noted the "steady increase in the number of orphaned retirees whose employers have either gone out of business or no longer provide health care benefits." *Id.*

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[7] The Coal Commission found that, while companies contributing to the UMWA multiemployer health benefit system in 1950 represented 80 percent of the coal produced in the nation, "by 1990, companies making contributions to the [UMWA Benefit Trusts] account[ed] for only 30 percent of national coal production." Coal Commission Report at 2.

In light of these facts and its finding that the 1950 and 1974 Benefit Trusts' funding bases were declining faster than their beneficiary populations, the Coal Commission predicted that the Benefit Trusts would have a combined estimated deficit of $300 million by 1993. *Id.* at 3.

The Coal Commission recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis, because, by its very nature, collective bargaining could only address those employers that were still mining coal and were still doing so with employees represented by the UMWA. Coal Commission Report at 3. The Commission therefore recommended two statutory approaches. Under the first approach, the Commission called for the creation of two new funds: (1) a quasi-governmental corporation financed by an industry-wide tax on all coal operators to finance the health care of UMWA orphan retirees; and (2) a private multiemployer fund financed by signatories to the 1978 and later NBCWAs to provide health care to UMWA retirees whose last employer remained in business. *Id.* at 61-64. The second approach called for the creation of a single, private multiemployer plan to provide health benefits to UMWA retirees in the 1950 and 1974 Benefit Trusts, including the orphan retirees. *Id.* at 65-69. To produce the revenue that the first approach would have generated through an industry-wide tax, the second approach contained a financing scheme that imposed liability not just upon employers that signed the 1978 or a later NBCWA, but upon *all* employers and their related business entities that were, at one time, signatory to one or more NBCWAs:

> Instead of imposing a new tax on all coal operators and establishing an agency of the federal government, *this plan seeks additional revenues from a broadened base of current and past signatories to the contracts*, establishing and providing revenues for the Benefit Funds. Past obligations would be defined as those arising from firms once signatory who may be iden-

> tified through a chain of succession to a current operator.

*Id.* at 65 (emphasis supplied); *see also id.* at 67.

### C. The Congressional Solution To The Health Care Crisis In The Coal Industry—The Coal Act

Following the Coal Commission's Report, Congress undertook its own intensive examination of the subject. The Coal Act was the final product of those deliberations. In enacting the Coal Act, Congress found that:

> it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Pet. App. 39a. Congress further stated that the policy of the Coal Act is:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

*Id.*

In the Coal Act, Congress created two new trust funds for the provision of health care benefits to retired miners and their dependents. One of those funds, the UMWA Combined Benefit Fund (the "Combined Fund") is at issue here.[8] As the statute required, the 1950 and 1974 UMWA Benefit Trusts were merged into the Combined

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[8] The Coal Act also created the 1992 UMWA Benefit Plan ("1992 Plan"), an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employers. *See* 26 U.S.C. § 9712.

Fund as of February 1, 1993. *See* 26 U.S.C. § 9702(a)(2). The Combined Fund now provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Trusts. 26 U.S.C. § 9703(a), (b)(1), (e), (f).

In the Coal Act, Congress adopted a financing arrangement for the Combined Fund similar to the second approach recommended by the Coal Commission, under which only employers that were signatory to one or more NBCWAs are required to share the burden of financing health benefits for the affected retirees and their dependents. Each employer's annual liability to the Combined Fund is based on the number of beneficiaries that have been assigned to it by the Secretary of Health and Human Services in accordance with a specific list of priorities set forth in the statute.[9] *See* 26 U.S.C. § 9706. Under the detailed statutory criteria, the Secretary is required to place a higher assignment priority on post-1978 NBCWA signatories than on pre-1978 NBCWA signatories.[10] The

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[9] As of March 31, 1995, the responsibilities of the Secretary under the Coal Act were transferred to the Commissioner of Social Security. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, §§ 105(a)(1), (2)(A); 108(h)(9)(A), (B); 110(a), 108 Stat. 1472-73, 1487-88.

[10] Specifically, the assignment rules provide that the Secretary is first required to assign each retiree to the employer that was signatory to the 1978 NBCWA or any subsequent NBCWA and that most recently employed the retiree for at least two years. 26 U.S.C. § 9706(a). If the Secretary cannot assign a retiree to a coal operator pursuant to this first method, she is next required to assign the retiree to the coal operator that was signatory to the 1978 NBCWA or any subsequent NBCWA, and that employed the retiree most recently in the coal industry, without regard to the number of years of employment. Third, if she cannot assign a retiree to a coal operator pursuant to the first two methods, the Secretary is required to assign the retiree to the pre-1978 signatory operator that employed the retiree for the longest period of time. If the Secretary cannot identify any NBCWA signatory operator that remains in business (or that has a "related person" remaining

Coal Act also assigns to 1988 NBCWA signatories the financial responsibility for funding the start-up costs of the Combined Fund, 26 U.S.C. § 9704(i)(1)(A), and for eliminating any deficit of the 1950 and 1974 Benefit Trusts as of February 1, 1993, the termination date of the 1988 NBCWA and the date on which the Combined Fund began providing benefits under the statute, 26 U.S.C. § 9704(i)(1)(B).

### D. Blue Diamond's Participation In The UMWA Trusts And Its Role In The Financial Crisis Leading To The Passage Of The Coal Act

Blue Diamond initially incorporated in Tennessee in 1915 and reincorporated in Delaware in 1922. *See Boggs v. Blue Diamond Coal Company*, 432 F. Supp. 19 (E.D. Tenn. 1977). Throughout its corporate existence, and continuing to the present day, Blue Diamond has mined bituminous coal, primarily in Kentucky and Tennessee. *Id.* at 23. Currently, Blue Diamond receives significant revenue from its production of more than two million tons of coal annually, primarily from sales contracts with utility companies, including Georgia Power, Orlando Public Utilities, and Central Illinois Light.

Blue Diamond's involvement with the collectively bargained multiemployer system for providing health care to retired UMWA miners and their dependents dates back to the system's very creation. Blue Diamond was actively and extensively engaged in bituminous coal mining in 1946, and for many years it employed UMWA-represented employees to generate profits from its business. From the time of the federal government's seizure of the nation's

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in business) and that formerly employed a particular retiree, the retiree is designated an "unassigned beneficiary," and his health benefits are financed by the statutory transfers of funds from the UMWA 1950 Pension Plan or the Abandoned Mine Reclamation Fund and, if necessary, by the assigned operators' payment of an unassigned beneficiaries premium. *See* 26 U.S.C. §§ 9704(d), 9705, 30 U.S.C. § 1232(h).

coal mines in 1946, Blue Diamond was one of the companies involved in providing health care to active and retired miners through a multiemployer plan. As such, it was also one of the original coal operators required to pay royalties to the 1946 W&R Fund.

Following the Krug-Lewis Agreement and the establishment of the 1946 W&R Fund, Blue Diamond continued to play an active role in the events that shaped the history of the UMWA multiemployer health benefit system. In particular, Blue Diamond was signatory to both the 1947 and 1950 NBCWAs, and to the February 1, 1951, October 1, 1952, September 1, 1955, October 1, 1956, and December 1, 1958 amendments to the 1950 NBCWA. Under these agreements, Blue Diamond paid royalties to the 1947 W&R Fund and the 1950 W&R Fund. During its years as a signatory to multiple coal wage agreements with the UMWA, Blue Diamond reaped economic benefits not only of the miners' labor but also of the maintenance of a stable available pool of skilled labor, which the UMWA multiemployer health care system encouraged and supported.

Blue Diamond continued its active participation in the multiemployer system for approximately eighteen years, until mid-1964. At that time, Blue Diamond succeeded, after a lengthy labor dispute, in refusing to sign further collective bargaining agreements with the UMWA. Blue Diamond ceased participating in the UMWA Trusts, and stopped paying contributions to them. The UMWA Trusts, however, continued to provide comprehensive health care benefits to petitioner's retirees. During the period after petitioner ceased to participate in the UMWA Trusts, and before the Coal Act became effective, these benefits were financed entirely by other coal companies.

As a result of Blue Diamond's extensive involvement in the coal industry and with the UMWA Trusts, a significant number of beneficiaries in the 1950 and 1974 Benefit

Trusts as of the time those Trusts were merged into the Combined Fund under the Coal Act were Blue Diamond retirees and their dependents. Accordingly, the Secretary assigned Blue Diamond approximately 1400 Combined Fund beneficiaries.[11] Until Congress intervened by passing the Coal Act, all of these beneficiaries had been receiving health care financed entirely by other employers. Indeed, as long ago as 1964, when Blue Diamond ceased participating in the 1950 W&R Fund, at least seventy-four of the beneficiaries that now have been assigned to it under the Coal Act were already receiving retiree health benefits. For more than twenty-eight years, these beneficiaries received comprehensive health and medical coverage from the UMWA Trusts that was financed entirely by employers other than Blue Diamond.

### E. Blue Diamond's Constitutional Challenge To The Coal Act

In May 1993, Blue Diamond, a reorganized Chapter 11 debtor, filed an adversary proceeding in the Bankruptcy Court for the Eastern District of Tennessee seeking declaratory and injunctive relief barring the Trustees of the Combined Fund from enforcing the Coal Act. Blue Diamond alleged that the Act violates the Due Process and Takings Clauses of the Fifth Amendment. The district

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[11] Blue Diamond incorrectly states (Pet. 2) that its "first annual assessment under the Coal Act amounted to 4.9 million dollars." In fact, the assessment to which petitioner refers covered the Combined Fund's first two plan years, February 1 to September 30, 1993, and October 1, 1993 to September 30, 1994. *See* 26 U.S.C. § 9702(c). Because, as authorized by Section 9706 of the Coal Act, 26 U.S.C. § 9706, the Secretary did not complete the assignments of Combined Fund beneficiaries until approximately October 1, 1993, premiums for the Combined Fund's first two plan years were assessed and paid during the second plan year. *See* 26 U.S.C. § 9704(g). In the meantime, as stated above (page 13, *supra*), the 1988 NBCWA signatory operators were responsible for funding the Combined Fund's start-up costs during the first plan year. 26 U.S.C. § 9704(i)(1)(A).

court withdrew the reference of the adversary proceeding from the Bankruptcy Court and, on cross motions for summary judgment, upheld the constitutionality of the Coal Act in its entirety. The court ruled that Congress rationally chose "to spread the costs of the Combined Fund's benefits to those employers who had profited from the labor of UMWA miners and who, at some time in their histories, had contributed to multi-employer welfare benefit funds." Pet. App. 30a. The court also rejected petitioner's takings challenge, concluding that "Blue Diamond contributed to the problem and should be part of the solution" (*id.* at 35a) and that "[i]t would be unfair if the lifetime health costs of Blue Diamond's own retirees were to be born[e] by its competitors in the coal industry" (*id.* at 37a).

The court of appeals affirmed. Observing that "several federal courts have found that UMWA members had a legitimate expectation of lifetime benefits before the 1974 NBCWA" based on the long history of benefits from the UMWA Trusts, the court held that "Congress certainly had a rational basis for concluding that all NBCWA signatories and 'me-too' operators who agreed to be bound by the NBCWAs, including Blue Diamond, contributed toward the legitimate expectations of the UMWA members." Pet. App. 13a. The court likewise rejected petitioner's takings argument, ruling that "none of the significant factors in the Takings Clause inquiry favors Blue Diamond." *Id.* at 22a.

## ARGUMENT

The decision of the court of appeals is correct, and review by this Court is not warranted. There is plainly no unresolved or controversial question of federal constitutional law presented here. Five panels of four courts of appeals (including the decision below) have unqualifiedly upheld the constitutionality of the Coal Act in the face of challenges like petitioner's. *See Lindsey Coal Mining Company Liquidating Trust v. Chater*, 90 F.3d 688 (3d

Cir. 1996); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, Nos. 95-1709 and 95-1751 (Oct. 7, 1996); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 116 S. Ct. 64 (1995); *LTV Steel Company, Inc. v. Shalala*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995).

In addition, several district courts have held that the Coal Act comports fully with the Due Process and Takings Clauses of the Fifth Amendment. *See Lone Star Steel Company v. Chater, et al.*, Civ. No. 3:94-CV-652-R (N.D. Tex. Aug. 26, 1996); *Holland v. Eagle Coal & Dock Co.*, Civ. No. 2:94-0880 (S.D. W. Va. Mar. 8, 1996); *Holland v. High-Tech Collieries, Inc.*, 911 F. Supp. 1021 (N.D. W. Va. 1996); *Holland v. Imperial Colliery Co.*, Civ. No. 1:94-0793 (S.D. W. Va. Dec. 7, 1995); *Holland v. Milburn Colliery Co.*, Civ. No. 1:94-0801 (S.D. W. Va. Dec. 1, 1995); *Holland v. Keenan Trucking Co.*, Civ. No. 2:93-1223 (S.D. W. Va. Mar. 15, 1995), *appeal pending*, No. 96-1262 (4th Cir. argued Oct. 29, 1996). *But see Unity Real Estate Co. v. Hudson*, 889 F. Supp. 818 (W.D. Pa. 1995) (order granting preliminary injunction in favor of related person alleging inability to pay) (motions for summary judgment pending).

There is no suggestion by petitioner that a conflict among the courts of appeals exists, or is even likely to occur in the future. As petitioner observes, the courts of appeals have uniformly sustained the constitutionality of the Coal Act. Pet. 8. Here, as in the earlier Coal Act cases in which this Court has denied review, the agreement among the courts of appeals and district courts, and the consistency of many rulings upholding the Coal Act with the precedents of this Court, militates strongly against further examination of the same legal arguments that have been rejected repeatedly without dissent in jurisdiction after jurisdiction.

## I. BLUE DIAMOND'S ENTIRE ARGUMENT DEPENDS ON AN EXCESSIVELY NARROW VIEW OF WHAT CONGRESS MAY CONSIDER IN ENACTING ECONOMIC LEGISLATION.

The thrust of petitioner's argument is that the court of appeals (like the Seventh Circuit in *Davon* and the Third Circuit in *Lindsey*) "disregarded" the fact that petitioner was never a signatory to an NBCWA that contained an explicit promise of lifetime benefits and wrongly concluded that petitioner had helped to foster an expectation of lifetime benefits for retired miners. This argument is misguided, and relies entirely on an improperly restricted conception of what Congress and courts may consider in assessing the rationality of economic legislation.

The court of appeals expressly acknowledged and addressed Blue Diamond's argument that "only the coal mine operators who signed the 1974 NBCWA or later NBCWAs, promised lifetime health benefits." Pet. App. 9a. The Court provided two answers, each of which is dispositive.

First, like the *Davon* court before it, the court of appeals concluded that petitioner's undisputed participation in the UMWA multiemployer health care system before 1974 helped to foster an expectation of lifetime benefits that justified Congress's decision to include pre-1974 signatories in the Coal Act financing scheme:

> ". . . [E]very NBCWA signatory company shared some responsibility in creating a legitimate expectation among miners of lifetime health benefits. . . . [T]he fact that plaintiffs never contractually agreed to provide lifetime benefits does not rebut the rationality of finding that they contributed to the expectation of lifetime benefits. The Coal Commission and Congress found that the promise of lifetime benefits dates back to the 1940s, even though it is not explicit in any NBCWA until 1974. Even if no such promise was made, every NBCWA contributed to the expectation

> by creating a continuous mechanism for providing UMWA multiemployer-sponsored health benefit plans. . . . Plaintiffs were part of this tradition and can rationally be said to have contributed to a reasonable expectation of lifetime health benefits."

Pet. App. 13a-14a (quoting *Davon*, 75 F.3d at 1124-25). The court's conclusion is entirely consistent with the district court decision on which Blue Diamond relies (Pet. 17), which declared, three years before passage of the Coal Act, that retirees' expectations were derived not only from the language of the NBCWAs but also from "the 25-year history of lifetime benefits prior to 1974 . . . ." *UMWA v. Nobel*, 720 F. Supp. 1169, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

Second, the court of appeals ruled that, even putting aside any issue regarding the legitimacy of UMWA retirees' expectations, Blue Diamond had contributed substantially to the liability of the 1950 and 1974 Benefit Trusts, and that therefore it was rational for Congress to include Blue Diamond in the legislative solution to the Trusts' financial difficulties. In the court's words,

> [e]ven if Blue Diamond did not specifically create the UMWA members' expectations of lifetime coverage or if those expectations were not reasonable, Congress could still impose Coal Act liability on Blue Diamond because of Blue Diamond's direct contributions to the Combined Fund's liability. . . . Blue Diamond directly contributed to the Combined Fund's liabilities by providing service credits to its former employees. . . . [A] contractual promise of lifetime benefits is not a "prerequisite" of a congressional finding that a party bears some responsibility for the expectations created by its past conduct.

Pet. App. 14a-15a (citations omitted). As Blue Diamond itself grudgingly concedes in the petition, "Blue Diamond's employment relationship with the persons receiving those

later entitlements, based in part on that past employment relationship, arguably can be said to have 'allow[ed]' those persons to become eligible for benefit entitlements at a later date, or to have 'contributed to the [Combined Fund's] eventual liability.'" Pet. 18 (brackets in original).

In short, petitioner has offered nothing new that in any way would call into question the conclusion correctly reached by both courts below and every other court that has considered the matter—Congress acted rationally in including Blue Diamond and other similarly situated employers among the group of companies that are required to finance the benefits provided by the Combined Fund.

Moreover, Blue Diamond's effort to slough off all financial responsibility for its retirees' health care and to place that entire responsibility on 1974 and later NBCWA signatories overlooks a critical point. *Every NBCWA*—not only the NBCWAs and numerous amendments that Blue Diamond signed but the several later NBCWAs, including the NBCWAs of 1974, 1978, 1981, 1984, and 1988—was effective only for a term of years. This was just as true of the NBCWAs that referred to a "Health Services card until death" as it was of the earlier agreements. After each contract was terminated, the continued provision of health care depended on the negotiation and signing of a new national collective bargaining agreement that contained such benefits.

But, as the years went by, fewer and fewer employers were willing to sign such an agreement. That is why fewer and fewer employers were carrying the burden of the UMWA Trusts and why both Congress and the Coal Commission concluded that the problem of financing retiree health care in the coal industry could not be solved through the collective bargaining process. In the absence of a legislative solution, the signatories of the 1988 NBCWA, like Blue Diamond and all of the other past NBCWA signatories, could have refused to sign a new

collective bargaining agreement in 1993 or thereafter and then claimed that they had no further obligation to fund health care for their own former employees or anyone else's.

Blue Diamond's entire argument ignores the central question that confronted Congress during its deliberations on the Coal Act: who would pay for retiree health care in the coal industry after termination of the 1988 NBCWA, and in particular who would pay for benefits for the retirees of employers like Blue Diamond, which had long since discontinued their financial support for the UMWA Trusts. It was to answer this question that Congress chose to assess Coal Act obligations based on a finding of "responsibility" derived from past employment relationships rather than past contractual promises. There was, and is, nothing irrational about that approach.

## II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE COAL ACT DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING OF PETITIONER'S PROPERTY.

The basis of petitioner's takings challenge is that it "did not participate in the creation" of the problems that led to Congress's passage of the Coal Act. Pet. 17. The court of appeals correctly rejected that claim and concluded that all three Takings Clause factors identified by this Court in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and other cases support the validity of the Coal Act. Those three factors are the economic impact of the regulation, the extent to which the regulation has interfered with distinct and reasonable investment-backed expectations, and the character of the government action. As the court of appeals said, "Blue Diamond's Takings Clause challenge to the Coal Act fares no better than did the plaintiff's challenge [to the Multiemployer Pension Plan Amendments Act] in *Connolly*." Pet. App. 19a.

With respect to the economic impact of the Coal Act, the court of appeals emphasized, relying on *Connolly*, that

the proper question is not merely "the size of the company's liability" but rather "whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue." Pet. App. 19a. Here, the court of appeals held, the proportionality requirement is clearly satisfied:

> Blue Diamond's liability is at least roughly proportional to Blue Diamond's experience with the UMWA Fund. Nearly all of the approximately 1400 living beneficiaries assigned to Blue Diamond either worked for Blue Diamond or were related to someone who worked for Blue Diamond, and Blue Diamond provided service credits to those employees. The beneficiaries assigned to Blue Diamond were assigned to Blue Diamond only after they could not be assigned to a signatory to a more recent NBCWA. And although the Coal Act requires Blue Diamond also to pay a portion of the costs for the orphan retirees, the Coal Act relates Blue Diamond's assessment for orphan retirees to Blue Diamond's experience with the UMWA Fund.

*Id.*

Petitioner's contention that it is an "innocent bystander" is disingenuous. Pet. 20. During the period in which petitioner was signatory to NBCWAs, it contributed to the 1950 W&R Fund and its predecessors. Petitioner's employees accumulated, based on their work for petitioner, service credits that contributed to their entitlement to retiree health benefits from the 1950 W&R Fund and, after 1974, the 1950 Benefit Trust or the 1974 Benefit Trust. Petitioner's former employees actually received benefits from the UMWA Trusts for years, even though petitioner was not contributing to those Trusts. And when, under the Coal Act, the 1950 and 1974 Benefit Trusts were merged into the Combined Fund, petitioner's former employees became Combined Fund beneficiaries by operation of law.

Petitioner cannot abdicate responsibility for the crisis that led to the passage of the Coal Act. Petitioner participated in a system that engendered legitimate expectations of lifetime benefits and, when it withdrew from the Trusts and left behind its retirees, it contributed to the financial crisis that led to the Coal Act. When petitioner ceased contributing to the 1950 W&R Fund, the cost of providing health benefits for Blue Diamond's retirees and dependents was assumed by the remaining signatories to the NBCWA. When this practice of "dumping" by former NBCWA signatories multiplied years later, the entire system was pressed to the brink of ruin. Indisputably, petitioner played a role in the development of this crisis.

In addition, the Coal Act contains provisions that are intended to lessen the economic impact on assigned operators. Indeed, the Coal Act obligations of Blue Diamond and all other assigned operators have been reduced substantially by the three $70,000,000 transfers from the UMWA 1950 Pension Plan to the Combined Fund and by the first of several annual transfers from the Abandoned Mine Reclamation Fund established under the Surface Mining Act. 26 U.S.C. § 9705; 30 U.S.C. § 1232(h). These transfers have eliminated the requirement that assigned operators like petitioner pay any unassigned beneficiaries premiums during the Combined Fund's first five fiscal years. Of course, in the absence of the Coal Act, neither petitioner nor any other assigned operator would have had any legitimate claim to benefit from any of the assets of the 1950 Pension Plan. These assets were held in trust for the exclusive benefit of the Plan's beneficiaries. Likewise, absent the Coal Act, neither petitioner nor any other assigned operator legitimately could have expected to receive any benefit from the Abandoned Mine Reclamation Fund.

Turning to the second prong of this Court's Takings Clause cases, the court of appeals correctly rejected Blue

Diamond's claim that the Coal Act improperly interferes with Blue Diamond's reasonable, investment-backed expectations. In the first place, Blue Diamond did not identify any investments that it made in alleged reliance on the discontinuation of its contractual health care obligations to its former UMWA employees. More important, as the court of appeals held, given the historical origins of the UMWA Trusts, the extensive federal regulation of the coal industry, and repeated federal intervention in coal labor disputes involving benefits issues, "Blue Diamond cannot argue that it was reasonable for Blue Diamond to believe that Congress would never intervene in the management of the UMWA Fund or its successor funds." Pet. App. 20a-21a. In the court's words,

> [t]he federal government pervasively regulates the coal mining industry, the UMWA Fund originated from a federal takeover of the nation's coal mines, and federal intervention has been required to settle strikes over benefit issues . . . . Blue Diamond argues that it expected Congress to impose the costs of "bailing out" the UMWA Fund upon the general public. Such expectations clearly were unreasonable.

*Id.* at 20a, 21a. In essence, Blue Diamond's argument amounts to little more than the observation that the financial obligations imposed by the Coal Act go beyond those previously undertaken by contract in the NBCWAs that Blue Diamond signed. It is well-established, however, that Congress's power to legislate is not confined by the terms of pre-existing private contracts. As this Court recently has reconfirmed,

> "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts

about them." *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935).

> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.

*Connolly*, 475 U.S. at 223-24 (citations omitted).

Finally, with respect to the third takings factor, the character of government action, both the district court and the court of appeals likened the character of the Coal Act to the Multiemployer Pension Plan Amendments Act (MPPAA), which survived constitutional scrutiny in *Connolly* and in *Concrete Pipe & Products of California, Inc. v. Construction Laborers' Pension Trust*, 508 U.S. 602 (1993). Pet. App. 21a-22a, 37a. Like the MPPAA, the Coal Act does not physically invade petitioner's assets or permanently appropriate them for the government's own use. Rather, like the MPPAA, the statute requires payments to a private benefit fund, payments designed to protect the continuation of benefits, to strengthen the financial backing of the fund, and to forestall the potential imposition of additional burdens on the public fisc. This sort of economic regulatory action does not constitute a taking.

Petitioner nevertheless insists that the Coal Act shifted "public economic burdens onto selected private shoulders . . . ." Pet. 19. The argument is without merit. Congress had no obligation to spread the costs of the coal industry crisis to the public generally. Congress rationally and deliberately selected those entities that were directly responsible for creating the crisis in the coal industry to bear the financial onus of remedying the problem. In the district court's succinct summary, "[i]t is a coal industry problem which should be solved by the coal industry. Coal operators like Blue Diamond contributed to the problem and should be part of the solution." Pet. App. 35a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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No. 96-431

# In the Supreme Court of the United States

OCTOBER TERM, 1996

BLUE DIAMOND COAL COMPANY, PETITIONER

*v.*

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, violates the Just Compensation Clause of the Fifth Amendment as applied to petitioner.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 79 F.3d 516. The opinion of the

[1] The original federal party in this case was the Secretary of Health and Human Services. The Secretary's responsibilities under the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, were transferred to the Commissioner of Social Security as of March 31, 1995. See Social Security Independence and Program Improvements Act of 1994 (1994 Act), Pub. L. No. 103-296, §§ 105(a)(1) and (2)(A), 108(h)(9)(A) and (B), 110(a), 108 Stat. 1472, 1487-1488, 1490. In accordance with Section 106(d) of the 1994 Act, the Commissioner of Social Security is substituted for the Secretary of Health and Human Services as a party in this case. 108 Stat. 1477; see also Sup. Ct. R. 35.3.

district court (Pet. App. 23a-37a) is reported at 174 B.R. 722.

## JURISDICTION

The judgment of the court of appeals was entered on March 21, 1996. A petition for rehearing was denied on June 28, 1996. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on September 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.* (Coal Act or Act), enacted in response to a crisis in health care costs in the coal industry, had its origins in a series of collective bargaining agreements between coal mine operators and the United Mine Workers of America (UMWA). Those contracts, known as National Bituminous Coal Wage Agreements (NBCWAs), created multi-employer benefit plans that provided health care benefits to active and retired miners and to their dependents. See Pet. App. 4a-5a.

The health care benefits of coal miners, their dependents, and their survivors have for many years been a central issue in labor relations in the coal industry. In 1946, the federal government nationalized the coal industry in response to a UMWA strike over health and retirement benefits. The government and the UMWA subsequently negotiated a contract (the Krug-Lewis Agreement) that, among other things, established employer-sponsored health and retirement programs. In 1947, after the mines were returned to private control, the UMWA and the Bituminous Coal Operators Association (BCOA)

entered into the first NBCWA, which created a multi-employer health and welfare fund. Pet. App. 4a.

In 1950, a successor NBCWA established another multi-employer fund known as the 1950 Welfare and Retirement (W&R) Fund, to provide health care benefits to active and retired miners and to their dependents. Retired miners qualified for health care and other retirement benefits from the 1950 W&R Fund on the basis of portable service credits, which they accrued through their employment with NBCWA signatory operators. Pet. App. 12a. The 1950 W&R Fund was financed through per-ton royalties paid by signatory coal operators according to rates specified in successive NBCWAs or amendments. *Id.* at 4a-5a.

The 1950 W&R Fund provided both health and retirement benefits for active and retired miners until 1974, when Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* In response to ERISA's new funding requirements for pension plans, the 1974 NBCWA divided the 1950 W&R Fund into four "trusts," two of which—known as the 1950 Benefit Trust and the 1974 Benefit Trust—financed medical benefits.[2] The 1950 Benefit Trust provided health care benefits to miners who retired before 1976, and to their dependents. The 1974 Benefit Trust initially provided health care benefits to miners retiring subsequently, to their dependents, and to active miners. The 1974 NBCWA expressly promised that covered retired miners would retain health benefits for life. Pet. App. 5a.

The 1978 NBCWA limited the coverage of the 1974 Benefit Trust to "orphan" retired miners whose last

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[2] The other two trusts covered pension benefits for miners, and are not at issue in this case.

coal industry employer had gone out of business or had otherwise ceased contributing to the trusts, and to their dependents. Responsibility for the health care benefits of non-orphaned retirees, as well as active miners, was shifted to the individual coal operators remaining in business. See *Davon, Inc.* v. *Shalala*, 75 F.3d 1114, 1118 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996). The 1978 NBCWA contained a guarantee clause, which obligated signatories to make sufficient contributions to ensure payment of the lifetime benefits promised in the 1974 NBCWA, and an "evergreen" clause, binding 1978 signatories to the levels of funding specified in the 1978 and subsequent NBCWAs, whether or not they actually signed subsequent agreements. *Ibid.*

2. By the 1980s, a combination of demographic and economic factors seriously impaired the financial stability of the 1950 and 1974 Benefit Trusts. First, as throughout American industry, the costs of health care rose steeply. Second, structural changes in the coal industry caused substantial reductions in both the number of mine operators that were signatories to the NBCWAs and the number of active coal miners employed by signatory operators. Third, several employers that ended operations successfully contended in court that their obligation to provide health benefits to retired employees ceased with the last NBCWA that they signed, and that the 1974 Plan was responsible for their retirees' medical benefits. Thus, as more operators stopped contributing to the trusts, their withdrawals forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for newly orphaned retirees as well as their own retirees. See Pet. App. 5a.

After a protracted strike at the Pittston Coal Company in 1989, in which health benefits were a major issue, the Secretary of Labor established a bipartisan advisory commission to study the financial crisis confronting the Benefit Trusts. Pet. App. 5a. The Coal Commission identified the escalating costs of paying for "orphan" retirees as a primary source of the financial crisis. *Coal Commission Report: A Report to the Secretary of Labor and the American People* 2 (Nov. 1990) (*Coal Commission Report*). The Coal Commission proposed two possible solutions: an industry-wide funding plan taxing all current coal operators, and a more limited arrangement funded by past and present NBCWA signatories. *Id.* at viii, 60-65.

3. In October 1992, after extensive hearings on the health care crisis in the coal industry and the recommendations of the Coal Commission, Congress enacted the Coal Act. See Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C, 106 Stat. 3036. The Coal Act was intended "to remedy problems with the provision and funding of health care benefits * * * to the beneficiaries of [coal industry] multiemployer benefit plans"; to ensure "sufficient operating assets" for such plans; and "to provide for the continuation of a privately financed self-sufficient program" for delivering health care to the plan beneficiaries. § 19142(b), 106 Stat. 3037. Congress also found that, to ensure the proper functioning of interstate commerce, the coal industry's existing system for funding retiree health benefits should be modified "to identify persons most responsible for plan liabilities." § 19142(a), 106 Stat. 3037.

The Coal Act established a new private multiemployer plan, the UMWA Combined Benefit Fund

(Combined Fund), as the successor to the 1950 and 1974 UMWA Benefit Plans. 26 U.S.C. 9702(a)(1)-(2).[3] The Combined Fund is required to provide beneficiaries of the 1950 and 1974 Plans with substantially the same health benefit coverage that those plans provided. 26 U.S.C. 9703(b)(1). Health benefits under the Combined Fund are limited to retired miners and their dependents who were eligible to receive, and were receiving, benefits from the 1950 and 1974 Plans as of July 20, 1992. 26 U.S.C. 9703(e)-(f). The Combined Fund thus has a closed class of beneficiaries, the membership of which will diminish over time.

The Combined Fund is financed primarily through annual premiums. 26 U.S.C. 9704. Those premiums must be paid by companies that signed one or more NBCWAs, or that made contributions to the 1950 and 1974 Plans under related "me-too" wage agreements that they signed (collectively, signatory operators). See 26 U.S.C. 9701(b)(1) and (3), 9701(c)(1).

The Coal Act bases the amount of premiums on the principles that each signatory operator should bear the cost of providing benefits to its own retirees, and that all signatories should share proportionally in the industry-wide cost of providing benefits to orphan retirees. Toward the first end, the Act directs the Commissioner of Social Security to match beneficiaries of the Combined Fund with the signatory operator responsible for paying for their health care benefits. 26 U.S.C. 9706(a). Assignments are made pursuant to a statutory formula designed to place the primary burden on signatory operators who signed NBCWAs

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[3] The Act also created another plan, the 1992 UMWA Benefit Plan, which is not at issue in this case. See 26 U.S.C. 9712.

in 1978 and thereafter. *Ibid.* If a company ceased participating in NBCWAs prior to 1978, it is not assigned responsibility for its former employees and their dependents unless those employees did not work for any surviving signatory operator that signed an NBCWA in 1978 or thereafter, and unless those employees worked for the company (or a related entity) longer than they worked for any other surviving operator. See 26 U.S.C. 9706(a)(1)-(3).

Signatory operators are also potentially responsible for a proportional share of the premiums for orphan beneficiaries, *i.e.*, retired miners whose former coal industry employers have all gone entirely out of business. To mitigate that additional burden, however, the Act makes available additional sources of funding for the Combined Fund. 26 U.S.C. 9705(a)-(b); 30 U.S.C. 1232(h). Thus far, the existence of those additional funding sources has meant that signatory operators have not been required to pay premiums for unassigned beneficiaries.

4. Petitioner is a coal company that has been engaged in coal mining in Tennessee and Kentucky for more than 50 years. Pet. App. 7a. Petitioner signed the 1950 NBCWA and subsequent labor agreements during the 1950s and early 1960s. *Ibid.* During the time that petitioner conducted unionized mining operations pursuant to those NBCWAs, its employees accrued portable service credits, which were counted in determining their eventual eligibility for health benefits under the 1950 and 1974 Trusts. *Id.* at 12a; see p. 3, *supra*.

In 1964, petitioner stopped employing members of the UMWA and terminated its obligations to the 1950 W&R Fund. Pet. App. 7a. Petitioner has continued to mine coal since 1964 with non-union miners. *Ibid.*

Based on its participation in NBCWAs in the 1950s and 1960s, petitioner has been assigned beneficiaries under the Coal Act and is obligated to pay annual premiums to the Combined Fund.

Petitioner filed suit in the United States District Court for the Eastern District of Tennessee to enjoin the enforcement of its financial obligations under the Coal Act. Petitioner contended that the Coal Act's funding mechanism, as applied to coal operators that ceased to participate in NBCWAs before 1974, violates the Due Process Clause and the Just Compensation Clause of the Fifth Amendment.

The district court granted summary judgment for respondents, upholding the constitutionality of the Coal Act's funding obligations under both the Due Process Clause and the Just Compensation Clause. Pet. App. 23a-37a. Petitioner appealed, renewing both of its constitutional claims, and the court of appeals affirmed. *Id.* at 3a-22a.

The court of appeals first addressed petitioner's due process claim. Pet. App. 9a-17a. Petitioner argued that, because pre-1974 NBCWAs relied on a "pay as you go" funding mechanism for retiree health benefits and did not contractually obligate coal operators to provide lifetime health coverage, requiring pre-1974 NBCWA signatories like petitioner to contribute to the Combined Fund violates the Due Process Clause. *Id.* at 9a-10a. The court of appeals acknowledged that lifetime health benefits "were not vested or guaranteed" by pre-1974 NBCWAs. *Id.* at 4a; see also *id.* at 12a ("It is undisputed that the [pre-1974] NBCWAs did not contain an explicit promise of

lifetime benefits.").[4] However, the court determined that it was nonetheless rational for Congress to include pre-1974 NBCWA signatories, as well as later signatories, in the Coal Act's funding obligations.

The court of appeals identified two legitimate grounds for Congress to assign Combined Fund beneficiaries to pre-1974 signatories who, like petitioner, had employed them before their retirement. First, all NBCWAs, including those signed before 1974, provided miners with portable service credits that contributed to the eventual financial liabilities of the 1950 and 1974 Benefit Trusts. Pet. App. 12a. Because petitioner's UMWA miners had accrued portable service credits during their employment by petitioner—credits that counted toward their eventual eligibility for retirement health benefits (see p. 3, *supra*)—petitioner and similarly situated pre-1974 signatories bore at least some measure of responsibility for the financial liabilities that the Coal Act was designed to redress. *Id.* at 12a, 14a-15a. Second, although pre-1974 signatories did not expressly promise to provide lifetime health benefits, the lengthy and continuous industry practice of providing such benefits had created a legitimate expectation of lifetime coverage on the part of miners, and all NBCWA signatories shared in the responsibility for creating those expectations. *Id.* at 12a-14a.

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[4] Petitioner is therefore wrong when it asserts (Pet. 6) that the court of appeals "differed with the District Court's findings of fact" regarding the contractual obligations of pre-1974 NBCWA signatories. Compare Pet. App. 4a, 12a (court of appeals) with *id.* at 24a, 35a (district court).

The court of appeals then turned to petitioner's takings claim. Pet. App. 17a-22a. The court analyzed the claim by applying the three factors identified by this Court in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986): "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Pet. App. 18a.

In applying those criteria, the parties and the court looked for guidance to this Court's decisions in *Connolly* itself and in *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993). *Connolly* and *Concrete Pipe* involved the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, which retroactively imposed statutory "withdrawal liability" on employers who had withdrawn from multiemployer pension plans. This Court held that the MPPAA's withdrawal liability provisions did not amount to an uncompensated "taking" of property, either on their face (*Connolly*) or as applied to an individual employer (*Concrete Pipe*).

Here, petitioner acknowledged that the Coal Act could not be distinguished from the MPPAA with respect to two of the three *Connolly* factors, the Act's economic impact on petitioner and its claimed interference with petitioner's investment-backed expectations.[5] Petitioner therefore relied solely on

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[5] Petitioner asserted that "the economic impact and interference with reasonable investment backed expectations imposed on [petitioner] by the Coal Act are severe, extreme, and substantial," but conceded that "those two factors were also

the "character" of the government's actions as an asserted basis for distinguishing *Connolly* and *Concrete Pipe*. See Pet. C.A. Br. 39 ("[t]he decisive focus * * * has to be on the character of the legislation"). The court of appeals rejected that argument, concluding that the Coal Act did not differ materially from the MPPAA with respect to any of the *Connolly* factors. Pet. App. 19a-22a.

**ARGUMENT**

This is the latest in a series of cases challenging the constitutionality of the funding mechanisms of the Coal Act. The courts of appeals have been unanimous in rejecting those challenges. See *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832 (6th Cir.), cert. denied, 116 S. Ct. 64 (1995); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995); *Davon, Inc.* v. *Shalala*, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688 (3d Cir. 1996). In each of those cases in which review by this Court has been sought, the Court has declined review. Most recently, in *Davon*, the Court denied petitions for a writ of certiorari presenting exactly the same Just Compensation Clause challenge that petitioner is pursuing in this case. There is no reason for the Court to follow a different course here.

1. Petitioner's constitutional challenge focuses on the inclusion of pre-1974 signatory coal operators in the funding mechanism of the Coal Act. As the court of appeals recognized, however, Congress had sound

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present * * * in each of the [] *Concrete Pipe* line of cases." Pet. C.A. Br. 38.

reasons for requiring pre-1974 signatories as well as later signatories to contribute to the Combined Fund.

Every pre-1974 signatory employed miners who were entitled to receive retirement health benefits from the 1950 and 1974 Benefit Trusts. Those trusts were multi-employer trusts; miners received their entitlement to health care benefits based on portable service credits obtained from operators who signed one of the NBCWAs in effect since 1950. Moreover, those trusts provided "comprehensive health care benefits for retired miners and their families" for 45 years, *Coal Commission Report* vii, and retired miners had "legitimate expectations of health care benefits for life" from the trusts, *id.* at 1. It was therefore appropriate for Congress to require all the coal operators who contributed to the liabilities of the benefit funds to pay some of the cost for restoring the financial stability of the health care system. See *Concrete Pipe*, 508 U.S. at 638.

In addition, all signatory operators benefited substantially from participation in the multi-employer benefit system that was established in the 1940s and faced a crisis in the early 1990s. First, they plainly benefited from their own miners' labor. See 138 Cong. Rec. S17,603 (daily ed. Oct. 8, 1992) (Coal Act assigns financial responsibility to "those companies which employed the retirees in question and thereby benefitted from their services"). Moreover, all signatory operators benefited from the ease of movement of miners and the labor peace throughout the industry to which those multi-employer trusts (with their portable service credits) significantly contributed. Cf. *Concrete Pipe*, 508 U.S. at 638-639. Congress therefore properly concluded that all signatory operators could be held financially responsible for

making good on the "moral obligation to the [miners] and retirees" to contribute towards the cost of their health care. See *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 477 (1985).

Congress also reasonably concluded that inclusion of pre-1974 signatory operators in the Coal Act's financing scheme was necessary to secure adequate funding for the health care of retired coal miners and their dependents. Financial and actuarial figures presented at 1991 Senate hearings called into question the feasibility of limiting the so-called "reachback" provision to 1978 and later NBCWA signatories. A more limited reachback provision could well have left a significant number of beneficiaries of the 1950 UMWA Benefit Trust "orphaned." See Staff of House Comm. on Ways & Means, 103d Cong., 1st Sess., *Financing UMWA Coal Miner "Orphan Retiree" Health Benefits* 24-27 (Comm. Print 1993); 138 Cong. Rec. H11,413 (daily ed. Oct. 5, 1992) (Rep. Rahall) (noting that "75 percent of the retirees served by the [UMWA] health funds never worked for, or had any connection with, a currently contributing company"). Given that possibility, "[i]t [was] surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

2. In the proceedings below, petitioner contended that the application of the Coal Act to pre-1974 signatories violated both the Due Process Clause and the Just Compensation Clause (see p. 8, *supra*). Petitioner has now abandoned its due process claim, but continues to pursue the taking claim. As this Court has cautioned, however, when "due process argu-

ments [against economic legislation] are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violates the Takings Clause." *Concrete Pipe*, 508 U.S. at 641 (quoting *Connolly*, 475 U.S. at 223). The court of appeals correctly determined that there is no "taking" in this case.

a. As noted above, the only element of the three-factor *Connolly* test that petitioner invoked below to distinguish this case from *Connolly* and *Concrete Pipe* was the "character" of the government's action. As the court of appeals recognized, however, "the character of the Coal Act is identical to the character of the MPPAA." Pet. App. 21a-22a. In *Connolly*, the Court explained that the government's imposition of withdrawal liability under the MPPAA "d[id] not physically invade or permanently appropriate any of the employer's assets for [the government's] own use," but instead imposed a financial obligation on employers to "safeguard[] the participants in multi-employer pension plans." 475 U.S. at 225. The same is true here: the government has not taken any identifiable property of coal operators for its own use, but has only required the operators to contribute financially to a private entity that is responsible for paying the health care costs of retired miners.[6]

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[6] The Combined Fund established by the Coal Act is itself a private plan (see 26 U.S.C. 9702(a)(2)), and the Coal Act carries forward the privately negotiated health benefit scheme that the Combined Fund's predecessors operated prior to 1992. The Combined Fund provides benefits to the same people who were receiving benefits from the predecessor plans, and it provides the same medical coverage that they enjoyed prior to enactment of the Coal Act. 26 U.S.C. 9703(b)(1), 9703(f). In

The Coal Act, like the MPPAA, implements a "public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225. Even though it might be said that the Coal Act requires petitioner to devote its assets to satisfying its new financial obligations to the Combined Fund, "[g]iven the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Id.* at 223. Thus, petitioner "has not identified any of its property that was taken without just compensation." *Sperry*, 493 U.S. at 59.

b. *Connolly* and its progeny also look to the economic impact of the challenged regulation on the plaintiff. *Concrete Pipe*, 508 U.S. at €45; *Connolly*, 475 U.S. at 225. The court of appeals determined that petitioner's liability under the Coal Act is "at least roughly proportional" to its experience with the Combined Fund's predecessor funds. Pet. App. 19a.[7] The court noted, *inter alia*, that nearly all of the beneficiaries assigned to petitioner under the Coal Act were its former employees or their family members; that petitioner had provided service credits to those employees that counted toward their retirement health benefit eligibility; and that the Act assigned beneficiaries to petitioner only when they could not

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short, the Coal Act perpetuates the basic contours of a privately negotiated multi-employer benefit plan.

[7] It is undisputed that the relevant inquiry involves the proportionality of the burden rather than its absolute magnitude. See *Concrete Pipe*, 508 U.S. at 645; *Davon*, 75 F.3d at 1127-1128; *Chateaugay*, 53 F.3d at 494.

be assigned to signatories of more recent NBCWAs. *Id.* at 19a-20a.

Petitioner asserts (Pet. 15, 17) that the Coal Act's impact on it is disproportionate because the coal industry's health fund was not contractually liable for lifetime health benefits prior to 1974. Petitioner further argues (Pet. 18) that pre-1974 NBCWA signatories "did nothing to compel or even influence the 1974 contract negotiations that resulted in lifetime benefit entitlements."

This argument erroneously treats the 1974 NBCWA as a fundamental break between the coal industry's prior and subsequent retirement health care arrangements. As the Seventh Circuit pointed out in *Davon*, with regard to the issue of lifetime health coverage, "[n]othing radical happened in 1974." 75 F.3d at 1128. The express promises of lifetime benefits made to miners in 1974 and thereafter did not spring into existence from a void. Instead, the contractual guarantee of lifetime health benefits, and the health plan's corresponding contractual liability to employees and their dependents, were the direct products of more than 20 years of industry practice regarding health benefits under pre-1974 NBCWAs, including those to which petitioner was a party. As explained above, the health care system created by pre-1974 NBCWA signatories contributed to the legitimate expectations of miners and their dependents, and the explicit contractual guarantees provided in 1974 and thereafter were products of those expectations. Thus, the actions of pre-1974 signatories like petitioner did contribute, albeit indirectly, to the ultimate liabilities of the industry's health plans. See *ibid.*

Petitioner's argument presupposes that contractual liability is the benchmark of proportionality for Just Compensation Clause purposes. But nothing in *Connolly* or *Concrete Pipe* supports that premise.[8] As the Second Circuit held in *Chateaugay*, it is "the employment relationship [that] supplies the rational link": "[b]y * * * mooring a given company's funding obligations to a legitimate measure of its prior benefit from the UMWA health care system, the Coal Act rationally apportions future financial responsibility according to past contributions." 53 F.3d at 494. As explained above, petitioner's funding obligations are directly tied to its past employment of miners receiving health benefits under the Coal Act, and the Act in fact skews the assignment of beneficiaries away from companies like petitioner that did not sign NBCWAs after 1974 (see pp. 6-7, *supra*). Under these circumstances, measuring the Act's financial obligations against the "yardstick * * * of proportionality" (*Chateaugay*, 53 F.3d at 494) hardly suggests that petitioner has suffered an unconstitutional taking.

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[8] Petitioner asserts that the existence of contractual liability was *"essential"* to the holdings in *Connolly* and *Concrete Pipe* (Pet. 14). But *Connolly* actually points in precisely the opposite direction. As the Court there explained, "[a]ppellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it agreed. * * * If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." 475 U.S. at 223-224. *Connolly* thus makes clear that existing contractual obligations do *not* mark the limit of the government's authority under the Just Compensation Clause.

c. The remaining *Connolly* factor is the extent to which the statute interferes with "distinct investment-backed expectations" on the part of the regulated party. *Connolly*, 475 U.S. at 225. The court of appeals determined that the Coal Act did not interfere with petitioner's reasonable investment-backed expectations in a way that weighs in favor of finding a taking. Pet. App. 20a-21a. Although petitioner argues otherwise, it does not identify any distinct investments that were undertaken or foregone in the expectation that it would remain free from liability for the costs of its former employees' retirement health care.

In *Connolly*, employers who had withdrawn from a multi-employer pension plan when such withdrawal was fully free from liability contended that the subsequent, retroactive imposition of withdrawal liability by Congress upset their reasonable expectations. This Court concluded, however, that because pension plans had long been the objects of legislative concern even before the enactment of ERISA, prudent employers had more than sufficient notice before enactment of the withdrawal liability provisions that withdrawal might trigger future financial obligations. 475 U.S. at 227.

Here too, the long history of federal involvement in the coal industry (and particularly in the issue of health benefits for coal miners) belies the notion that pre-1974 NBCWA signatories could have reasonably expected future immunity from further contribution toward meeting the costs of retired employees' health benefits. As early as 1946, when the government nationalized the coal mines and negotiated the Krug-Lewis Agreement, it was clear both that the stability of the coal industry demanded adequate employee

health and welfare benefits, and that the federal government was prepared to intervene to ensure the availability of those benefits. The first multiemployer welfare and retirement fund, set up by the 1946 Krug-Lewis Agreement, was managed by three trustees, one of whom was appointed by the federal government. *Coal Commission Report* 18-19.[9] From that point on, the federal government's involvement in establishing the health care delivery system for retired miners was extensive. *Id.* at 21, 22, 23, 28. Thus, signatory operators who ceased to contribute to the industry's multiemployer health benefit program can hardly have expected that they would escape all financial responsibility in the event of further federal intervention on behalf of their former employees.

3. In asking this Court to review the decision below, petitioner argues primarily (Pet. 8-15) that the evidence it presented to the district court created a genuine issue of material fact, making it inappropriate for the district court to enter summary judgment against petitioner. Whether the state of the record in this case was sufficient to support summary judgment is a factbound question that does not warrant consideration by this Court. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In any event, nothing about the evidence proffered by petitioner required the district court to

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[9] Indeed, the Coal Commission noted that the multiemployer funds providing health care benefits to retired miners were created "in the White House in a contract between the federal government and the UMWA." *Coal Commission Report* vii.

engage in a factfinding trial before the constitutionality of the Coal Act could be determined.

The evidence relied on by petitioner, such as statements by the trustees of the 1950 W&R Fund about the non-vested character of the Fund's benefits, indicates that pre-1974 NBCWAs did not contractually obligate coal operators to provide lifetime health benefits (*e.g.*, Pet. 9).[10] But the decisions of the district court and the court of appeals do not rest on a contrary view of the facts. To the contrary, as noted above, the district court and the court of appeals both expressly acknowledged the absence of binding contractual obligations on the part of pre-1974 signatories. See Pet. App. 4a, 12a, 14a (court of appeals); *id.* at 24a, 35a (district court). Petitioner was not entitled to a trial to "prove" a matter that the courts below both accepted as true for purposes of their decisions.

Petitioner appears to contend that, because pre-1974 signatory operators were not contractually obligated to provide miners with lifetime health benefits, the court of appeals had no basis for determining that miners had legitimate expectations of receiving lifetime care. That is a *non sequitur*. As the court of appeals pointed out, the coal industry provided lifetime health coverage for retired miners virtually without interruption for more than 40 years, from the signing of the first NBCWA in the late 1940s until the enactment of the Coal Act in 1992. It was

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[10] We note that substantially the same evidence was presented to the district court and the Seventh Circuit in *Davon*. See, *e.g.*, *Templeton Coal Co.* v. *Shalala*, 882 F. Supp. 799, 815 (S.D. Ind. 1995), aff'd *sub nom. Davon, Inc.* v. *Shalala*, 75 F.3d 1114, cert. denied, 117 S. Ct. 50 (1996).

the existence of this "continuous mechanism" (*Davon*, 75 F.3d at 1125), not the presence of explicit contractual guarantees, that gave rise to legitimate expectations of continued health coverage on the part of miners and their dependents. Each successive NBCWA contributed to the development and maintenance of that system, and all NBCWA signatories played a role in the resulting expectations of the health funds' beneficiaries. Thus, to the extent that the court of appeals' Just Compensation Clause analysis depends on the legitimate expectations of the Combined Fund's beneficiaries, the decision is firmly grounded in industry experience.

Petitioner also urges this Court (Pet. 16-17) to grant review in order to adopt the views expressed in Justice Scalia's dissent in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), and Justice O'Connor's concurring opinions in *Connolly* and *Concrete Pipe*. The decision below, however, is entirely consistent with those views. Because all NBCWA signatory operators, including pre-1974 signatories, played at least some part in the eventual development of the health care crisis that led to the Coal Act, this is not a case in which the government is compelling "one citizen [to] pay * * * to remedy a social problem that is none of his creation." *Pennell*, 485 U.S. at 23 (Scalia, J., dissenting). And for the reasons set forth above, the Sixth Circuit and the other courts of appeals had ample basis for finding that the conduct of pre-1974 signatories "make[s] it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility." *Concrete Pipe*, 508 U.S. at 647-648 (O'Connor, J., concurring); see generally *Connolly*, 475 U.S. at 228-236 (O'Connor, J., concurring).

The fundamental question under the Just Compensation Clause is whether Congress is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly*, 475 U.S. at 227. That is not the case here. It was eminently reasonable for Congress to conclude that NBCWA signatories as a class bear a collective responsibility, and one greater than that of the public as a whole, for the health care of retired coal miners and their dependents. Coal operators such as petitioner benefited from the labor of those miners as well as from the multi-employer health care system established to benefit the coal industry as a whole. Companies that left the collective bargaining process left behind miners whose retirement health care costs were ultimately borne by other operators. Under those circumstances, "fairness and justice" do not require the public at large to assume the costs of the Combined Fund, nor do they entitle petitioner to immunity from those costs.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996

# REPLY

# BRIEF

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

(A)

No. 96-431

In The

# Supreme Court of the United States

October Term, 1995

BLUE DIAMOND COAL COMPANY,

*Petitioner,*

*vs.*

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY and MARTY D. HUDSON, MICHAEL HOLLAND, ELLIOT A. SEGAL, THOMAS O. S. RAND, CARLTON R. SICKLES, GAIL R. WILENSKY and WILLIAM P. HOBGOOD, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## REPLY BRIEF FOR PETITIONER

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Justice Holmes has declared that the Takings Clause question "depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). This Court should grant review of this case to rule on how those "particular facts" should be determined. The petitioner, Blue Diamond Coal Company, has submitted substantial evidence to the courts below, and to this Court, plainly establishing that it played no role in the creation of "legitimate expectations of lifetime health care benefits" on the part of its UMWA-affiliated employees and their families. Pet. at 9-10. Despite this, the respondents nevertheless insist that Blue Diamond did play such a role, and that role is what renders the Coal Act a "regulation" (of those "legitimate expectations") instead of a "taking" of Blue Diamond's money. The Sixth Circuit Court of Appeals, following the lead of the Seventh Circuit Court of Appeals in *Davon, Inc. v. Shalala,* 75 F.3d 1114 (7th Cir. 1996), resolved this *fact issue* against Blue Diamond, upon the respondents' motions for summary judgment.

That result cannot be justified as proper summary judgment procedure. In these summary judgment proceedings, it was Blue Diamond's version, and proof, regarding disputed issues of fact, that should have been "presumed correct," and not the allegations of the movants. *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 456 (1992). Nor can that result be justified, on a Constitutional basis, on the grounds that legislative factual determinations, or assumptions, must be deemed correct if they have a "rational basis." This Court has expressly rejected "rational basis" as the standard of review for Takings Clause cases. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Dolan v. City of Tigard,* 114 S.Ct. 2309 (1994). As even the dissent in *Nollan* recognized, the Takings Clause incorporates Constitutional values distinct from the Fifth Amendment's Due Process Clause, and those values can be protected only by a *factual* judicial inquiry into the pertinent Takings Clause concerns. *See* Footnote 1 of Dissent, *Nollan,* 483 U.S. at 843. It is no answer to this case, as respondents suggest, that the

Coal Act may be "rational" economic legislation. Most respectfully, THE FAIRNESS AND JUSTICE GUARANTEED TO PROPERTY OWNERS BY THE TAKINGS CLAUSE CANNOT BE SUSTAINED BY RATIONALIZATIONS, PARTICULARLY FALSE ONES!

The respondents ignore these concerns. Instead, they continue to present their own distorted version of history, and their own distorted version of this case,[1] as truth, ignoring the foregoing precedents of this Court that reject the procedures by which "the truth" has been ascertained in this case, so far. Neither respondents nor the lower courts attempt to analyze the tripartite Takings Clause inquiries in terms of Blue Diamond's facts, which *Eastman Kodak* teaches should have been "presumed correct" from the very beginning.

*First,* as to the character of the Coal Act, the statute is indeed similar, but not identical, in nature to the Multi-Employer Pension Plan Amendments to ERISA (MEPPA) sustained by this Court in *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211 (1986) and *Concrete Pipe and Products of Calif., Inc.*

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1. In the District Court, Blue Diamond objected and moved to strike many of the factual allegations contained in the respondents' briefs, including their ultimate factual allegation that Blue Diamond helped to foster "legitimate expectations of lifetime benefits." The grounds for Blue Diamond's objection and motion were that the respondents' allegations were not established in their proof, were disproven by Blue Diamond's proof, and were ultimately shown to be untrue. Sixth Circuit Joint Appendix pp. 485-495, Plaintiff's Objection, Motion to Strike, and Response to Defendants' Statements of Undisputed Fact and Proposed Conclusions of Law. The District Court found Blue Diamond's objections and motion "well taken," and sustained it. Sixth Circuit Joint Appendix pp. 500-501, Order of October 4, 1994. The Sixth Circuit, like the respondents here ignored this ruling of the District Court. Unfortunately, the catalog of misstatements in respondents' factual presentations is too extensive for a point-by-point rebuttal in a Reply Brief limited to ten pages.

*v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993). No court below discussed the key factual difference between the two statutes. The MEPPA imposed the cost of unfunded vested liabilities upon those employers who created them. *See Connolly* and *Concrete Pipe*. The Coal Act, as applied to pre-1974 UMWA contract signatories, imposes the cost of unfunded vested liabilities upon employers who *did not create them*. The lower courts either ignored this difference altogether, as the Sixth Circuit did in its Takings Clause "character" analysis, or else assumed, on the basis of "rationality," that the difference did not exist, as the Seventh Circuit did in *Davon*. Either way, fairness and justice to the affected property owners was not served.

*Second*, as to the economic impact and proportionality of the Coal Act to pre-1974 signatories' "experience with the plan," no court below discussed proportionality in terms of the employer's "share of plan obligations incurred during [the employer's] association with the plan." *Concrete Pipe*, 508 U.S. at 643. The pre-1974 UMWA fund never incurred any long-term obligations whatsoever. Thus, not one of the lower courts reviewed "proportionality" by the same criteria this Court reviewed proportionality in *Connolly* and *Concrete Pipe*.

*Third*, as to reasonable investment-backed expectations, this Court in *Connolly* and *Concrete Pipe* found it unreasonable for employers to expect no liability, on the basis of their contracts, for "promised benefits." *Concrete Pipe*, 508 U.S. at 646. That finding was swayed primarily by the fact that each employer stood concurrently liable, notwithstanding their contracts, for unfunded vested benefits under ERISA anyway. The lower courts in this case found it unreasonable for employers to expect no liability, on the basis of their contracts, for benefits *they never promised*. No regulation of law existed, before 1974, that required Blue Diamond, or other pre-1974 signatories to fund retirement benefits, and particularly benefits they never

promised, under any circumstances! To reach their totally illogical and unjust conclusions against legitimate *employer* expectations, every court below, with the exception of District Judge Hull in this case, relied materially upon the pure rationalization that those employers had nonetheless "fostered legitimate expectations of lifetime benefits." So we are back full circle, with the Constitutionality of the Coal Act as applied to pre-1974 UMWA signatories, under the Takings Clause, resting exclusively upon a rationalization that Blue Diamond has proven *false.*

There is no fairness, and no justice in rewriting history to accommodate social welfare goals. There is no fairness, and no justice, in purported justifications that can pass as rationalizations, but not as truth. There is no fairness, and no justice in requiring Blue Diamond Coal Company to pay the cost of a promise, or, if you will, the cost of "legitimate expectations," *it manifestly did not make.*

The integrity of the Takings Clause as a guarantee of fairness and justice to property owners, and not a guarantee of mere rationality, compels the conclusion that this Court must grant certiorari in this case.

Respectfully submitted,

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